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No. 613

In the Supreme Court of the United States

OCTOBER TERM, 1938

SOUTHERN PACIFIC COMPANY, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 22–29) is not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered June 6, 1938 (R. 29). A motion for a new trial was overruled November 14, 1938 (R. 30). The petition for a writ of certiorari was filed January 24, 1939 (R. 30), and was granted March 6, 1939. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Petitioner has a through line railroad, on which government transportation rates are subject to land-grant deductions; it established an alternate through route, upon which lower rates are charged, by combining parts of the old land-grant line with new cut-offs or lieu lines constructed without land-grant aid. The question is whether the Government's land-grant deduction from the lower rate for through shipments should be based upon the land-grant mileage in the original line, or upon the land-grant mileage used in the new alternate route.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 38–41.

STATEMENT

The special findings of fact made by the court below (R. 5–22) may be summarized as follows:

In 1887, the petitioner completed a through line of railway between Portland, Oregon, and San Francisco, California, and established through rates over that line (R. 16). The length of that line was 774.86 miles, in aid of 663.16 miles of which lands had been granted to the railroad under Acts of Congress, so that rates were subject to land-grant deductions (R. 8–9).

In 1926, the petitioner without the aid of land grants completed the construction or acquisition of a series of lines which when joined constituted

alternate or lieu lines between points on the original line (R. 13–15). The distance between Portland and San Francisco, along these alternate lines, was reduced by about 50 miles to 725.03 miles, of which 258.13 miles was mileage in the original route, subject to land-grant deductions (R. 7).

The purpose of the construction or acquisition of the new lines was the development of local traffic, and the completion of an alternate or lieu line over which traffic could be moved more economically (R. 13–15).

The petitioner thereupon organized two routes between Portland and San Francisco, the first of which, called the Siskiyou Route, was the original line completed in 1887; and the second route, called the Cascade Route, consisted of the lines which were completed in 1926 and of parts of the original line (R. 15). After the two routes were constructed, the petitioner issued general instructions to route through shipments over the Cascade route for reasons of economy; thereby 1,275,000 tons of south-bound and 250,000 tons of north-bound traffic were diverted yearly from the Siskiyou route, although certain shipments were routed over the Siskiyou route, under Cascade tariffs, for reasons of economic handling of traffic. The petitioner maintained no through freight service over the Siskiyou route. Its scheduled daily train service included two manifest or through freight trains south-bound and one north-bound, in addition to local service,

over the Cascade route. Over the Siskiyou route there was only one local freight train each way daily between Black Butte, California, and Springfield, Oregon, the meeting points of the two routes; there is no finding as to any other service, either local or through, on that route (R. 16).

From the date of the organization of the Cascade route on September 1, 1926, until November 1931, the rates over the two routes were identical (R. 20). Effective November 11, 1931, the petitioner revised the through rates between Portland and San Francisco (R. 19).

This revision followed prolonged proceedings before the Interstate Commerce Commission. Since 1912 petitioner, in order to meet water competition, had very low through rates between San Francisco and Portland. In 1920 the Interstate Commerce Act was amended to require that such rates be reasonably compensatory. The Commission reopened its earlier proceedings in 1922 and in 1927 allowed lower port-to-port than intermediate rates; the intermediate rates were not to be more than 100 per cent higher than the through rates. The proceedings were again reopened because petitioner felt the rates to be too high to meet water competition; petitioner, to show that lower rates were compensatory, based its presentation on the transportation costs of the Cascade route; these costs, because the route is shorter and with fewer grades and sharp curves, are

substantially less than over the Siskiyou route. In 1930 the Commission allowed lower port-to-port rates, to be computed on a mileage basis. Petitioner on November 11, 1931, revised its entire rate schedule (R. 18–20).

On about 75 percent of the traffic, the through rates remained the same over both routes. On the 25 percent water competition traffic, which included the shipments involved in this case, through rates over the Cascade route were reduced to the minimum allowed by the Commission order and over the Siskiyou route the through rates were raised to a point approximately double what they had been before, and equivalent to the maximum of 100 percent permitted intermediate rates over the lowest through rates (R. 20–21).

Prior to the rate revision of November 11, 1931, the petitioner gave written notice to the Coordinator of Traffic of the Federal Traffic Board of the respondent, who was in charge of routing Government freight, that it proposed to apply the new rates to Government shipments, and advised the Coordinator that the Government might use either the Siskiyou or the Cascade route, and that the Government's routing with respect to either line would be followed [1] (R. 20).

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[1] The petitioner contended that while the Government was entitled to a deduction of 42.792 percent of the traffic rate over the Siskiyou route, based upon the proportion of line subject to land-grant deductions, as compared with the total length of the haul, it was entitled to a deduction of only

In December 1931 and January 1932 the petitioner transported numerous shipments on Government bills of lading between Portland and San Francisco. Those shipments were unrouted by the respondent (R. 6). The petitioner assessed charges for the shipments based upon the lowest tariff rate applicable to the Cascade route less a land-grant deduction of 17.801 percent.[2] The respondent's accounting officers, on the other hand, made payments to the petitioner by deducting from the tariff rate on the Cascade route the land-grant deduction of 42.792 percent, which was the land-grant deduction employed in the original line between Portland and San Francisco (R. 12).[3]

On April 4, 1933, the petitioner filed suit in the Court of Claims asking judgment for the difference between the sums paid under the various settle-

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17.801 percent from the rates for the Cascade route, on the ground that the deduction should be determined solely with respect to the new route, and be based upon the proportionate mileage subject to land-grant deductions as compared with the total length of the haul in the new route. The Cascade rates, even with this small deduction, were lower than the Siskiyou rates with the larger deduction (R. 11).

[2] As a matter of fact, the petitioner transported those shipments over a third combination of its lines for which no through tariffs were published (R. 21), and which included more land-grant mileage than the Cascade route, amounting to 24.182 percent of the total haul (R. 10).

[3] There were also shipments between East Portland, 0.7 mile from Portland, and San Francisco (R. 6), with respect to which the Government claimed a deduction of 42.831 percent, and the petitioner conceded a deduction of only 17.819 percent.

ments of the accounting officers and the amounts claimed by it in its various bills (R. 1–4). The court below held that the petitioner was not entitled to recover, and dismissed the petition (R. 29). Thereafter a motion for new trial was overruled (R. 30).

SUMMARY OF ARGUMENT

By the Act of June 25, 1866, petitioner was obligated to transport troops and property of the respondent free of charge between the towns of East Portland, Oregon, and Roseville, California, as consideration for the grant of land with which to aid the railroad construction between these points. Its obligations were reduced by the Act of May 23, 1928, which provided that petitioner should be paid 50 per cent of the published tariff rates over its line.

I

The 1866 Act provides that Government property and troops "shall be transported over said road" at the cost of the company; the 1928 Act speaks of "the land grant railroad * * * operated between * * * East Portland * * * and Roseville." Since Roseville is the junction through which the shipments involved in fact moved, the 1928 Act equally with the 1866 Act support the terminal-to-terminal construction of the contract.

Plainly enough, when the United States granted to petitioner lands in aid of the construction of its

railroad it wished to receive, not the meaningless privilege of free transportation over one particular line of rails, but the practical benefit of free transportation between the designated terminals, no matter which route should be used by the railroad. The modification in the contract made by the Act of 1928 merely reduced the benefit to which the United States was entitled; it was not intended in addition to amount to a waiver of the right of the Government to the most economical use of the railroad lines between the terminals.

II

As long ago as April 17, 1888, the Comptroller of the Treasury ruled that the construction of a new line without Government aid between two points in place of a line constructed with Government aid did not alter the proportionate deduction to which the Government was entitled over the original line. This rule has become settled through a series of administrative rulings extending up to the present time. Two rulings of the Comptroller of the Treasury in 1900 and 1902, relied upon by petitioner, were confined to situations where the alternative lines were constructed by independent railroads to different points, and only subsequently projected to a second common point and brought under common control. The settled administrative construction has specifically been approved in *United States* v. *Northern Pacific Railroad Co.*, 30 F. (2d) 655 (C. C. A. 8th).

III

Not only have the controlling statutes received a settled administrative construction, but the practical interpretation placed upon the contract by the parties require that petitioner's present contention be rejected. The settled practice of respondent's accounting officers has almost uniformly been acquiesced in by the carriers, as is demonstrated by the fact that only one other suit has been instituted to challenge the Comptroller's rulings. And even in the case of the particular petitioner here, there has been a long period in which it has accepted this administrative construction. From September 1, 1926, the date of the completion of the Cascade route, to November 11, 1931, the petitioner submitted its vouchers on the basis of the full land grant deduction allowed over the original Siskiyou route. Since, during this period, it had issued instructions to route through traffic over the Cascade route, it reasonably follows that the Government shipments were transported over the Cascade route. In addition, the representative of petitioner who appeared before the Congressional committee which was considering the 1928 Act, stated that if petitioner received the benefit of that Act, and became a 50 per cent line, "of course the Government will have the choice of either of these routes at 50 per cent."

IV

Petitioner urges that it is under no obligation to apply the original proportion because the Interstate Commerce Commission refused to allow a reduction in the rates over the Siskiyou route comparable to the Fourth Section relief given on transportation between the ports over the Cascade route. The contention is unfounded.

Even if the Commission had refused to allow lowered Siskiyou rates, petitioner's land grant obligations are not eliminated on any such primitive theory of retaliation; the land grant obligations and the duties arising out of the Interstate Commerce Act are wholly independent congeries of the relationships.

But, in point of fact, the Commission did not refuse permission for the lowered rates to be applied over the Siskiyou route. There is nothing in the opinion of the Commission (165 I. C. C. 373) to indicate so improbable a result as extending relief to one but not the other of the alternative routes. There are numerous indications in the opinion of the Commission, and in its interpretation by petitioner as applicable in other respects to the Siskiyou route, which forbids the interpretation adopted in this case by petitioner. It results that petitioner could have applied the Fourth Section relief to the Siskiyou route; since the minimum rates were computed upon a mileage basis, this would indicate a compulsory differential of only about 6.5 per cent

instead of the 100 per cent differential instituted by petitioner.

But, even if petitioner could escape its land grant obligations because of the order of the Commission, and even if this order was in truth applicable only to the Cascade route, there was yet no compulsion upon petitioner to place its intermediate rates over the Siskiyou route at a figure which was double the through Cascade rate.

In result, the conclusion seems inescapable that the Siskiyou route is maintained as a through route only on paper, for the purpose of eliminating a substantial portion of the advantage over private shippers which petitioner had contracted to give the Government.

ARGUMENT

That part of the Siskiyou route which extends between the towns of East Portland, Oregon, and Roseville, California, was constructed with the aid of land grants. The Act of June 25, 1866, *infra*, p. 38, which authorized the granting of certain lands to aid in the construction of the road between East Portland, Oregon, and some point on the Central Pacific Railroad in Sacramento Valley, California, stated that the purpose of the grant was "to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad." The terms of this Act, which Act constitutes the contract, require that the petitioner should keep the line in

repair and use, that the Government should be entitled to preference in the use of the line, that it should be free of all tolls or charges upon the transportation of property and troops of the United States, and that the property or troops of the United States should be transported over the line at the cost of the company operating it. The petitioner operated under this contract until May 23, 1928, during which time it transported troops and property of the United States between Portland and Roseville without cost to the United States. *Southern Pacific Co.* v. *United States,* 237 U. S. 202. In that respect the Act here involved differs from those Acts which provide that the United States shall have the free use of the road only, such as the one involved in the case of *Lake Superior & Miss. R. R. Co.* v. *United States,* 93 U. S. 442. There it was held that while the United States had the right to the free use of the line, it must pay the cost of the transportation. That cost was established in the case of *Atchison R. R. Co.* v. *United States,* 15 C. Cls. 126, to be 50 per cent of the ordinary tariff rates for private transportation, and that percentage has since been applied as a reasonable rate for the cost of the haul. The value of the use of the road has been considered to constitute the remaining 50 per cent.

By the Act of May 23, 1928, *infra,* p. 40, Congress provided that the land-grant railroad operated between East Portland, Oregon, and Roseville, Cali-

fornia, should be paid the same rate, namely, 50 percent of the published tariff rates, as is paid to certain other land-grant railroads organized under certain prior acts. Senate Rep. No. 698, 70th Cong., 1st Sess., p. 1. The net result of the Act of May 23, 1928, was to make the petitioner's line a 50 percent land-grant line (R. 9) in place of a free land-grant line which it had been.

Prior to May 23, 1928, the contract between the parties required the carrier to carry the goods and troops of the United States free of charge between Portland and Roseville. The consideration which the United States was to receive consisted of the transportation of the goods from one point to another, and not the route or means by which it was transported. Thereafter, the contract between the parties required such transportation for 50 percent of that charged private shippers; but the contract was still for the transportation, and not the route or means by which it was performed. At that time Congress had before it the history of the land-grant line, the manner in which it was being operated in conjunction with the cut-offs which now comprise part of the Cascade route and the rates then being paid for transportation irrespective of which route was used. In the light of those circumstances, the reasonable obligation of the contract as modified, the long continued administrative construction, and the practical interpretation which the parties themselves placed upon the contract, we believe that the

United States was entitled to a land-grant deduction in the through terminal rates, no matter which route was used, proportional to the land-grant mileage constructed in the original route between East Portland, Oregon, and Roseville, California.

I

THE OBLIGATION OF THE CONTRACT

Petitioner (Br. 20–23) insists that its contract with the Government is clear and unambiguous, and that it cannot be construed in the light of any evidence beyond the words of the statute alone. In this connection it emphasizes that it has fulfilled all the obligations imposed upon it by that contract (Br. 12–19). It should narrow the field of controversy if we agree at the outset that an "unambiguous" contract needs no external aid to its construction (cf. *Lake Superior & Miss. R. R. Co.* v. *United States, supra,* p. 444) and that petitioner has in no way breached its contract (except, of course, so far as it has submitted transportation vouchers which are too high).

Petitioner, however, nowhere explains why the Act of July 25, 1866, *infra,* as amended by the Act of May 23, 1928, *infra,* is supposed to be clear and unambiguous. The 1866 Act provides that the "railroad" should be free of all toll on government transportation and that government property and troops "shall be transported over said road" at the cost of the company. Advocates could debate end-

lessly as to whether this refers to transportation between designated terminals or over particular segments of railroad, or, indeed, what was meant by the term "railroad" (see *Lake Superior & Miss. R. R. Co.* v. *United States, supra*). There is equal room for debate in the 1928 Act, enacted after completion of the alternative Cascade route. It rather plainly contemplates the terminal-to-terminal interpretation, in speaking of "the land-grant railroad heretofore operated, and now being operated, between the station formerly known as East Portland, in the State of Oregon, and Roseville, in the State of California." It is true that Roseville is on the Siskiyou but not the Cascade route. But, as shown by Exhibit 23 (made a part of the findings, R. 7), Roseville is the junction with the eastern lines of petitioner and is the end of the land-grant mileage from Portland to San Francisco; all of the shipments involved in this case, nominally routed over the Cascade route, in truth followed the Siskiyou route from Tahama to Roseville (R. 21), where, one supposes, full trains for San Francisco were made up with cars coming over the eastern lines.

However, even if the particular words used in the statutes were unequivocally to support petitioner, as they do not, the contract must still, in the light of its purpose, be construed to insure the full land-grant deduction, whatever alternative route petitioner chooses to construct and use between

the terminals. The grant of land in aid of the construction of the railroad over which troops and property of the United States were to pass, either free or at a reduced tariff, constituted a prepayment on the part of the United States for the future transportation which it might require. When the line between East Portland and Roseville was completed, the United States had paid in advance for all future transportation of its property and troops between those points. Cf. *Louisville & Nashville R. R. Co.* v. *United States*, 267 U. S. 395, 402. The practical benefit which the United States was to obtain for its contribution was transportation of its troops and property between certain points, and not the meaningless privilege of free or cheaper transportation of its troops and property over one particular line of rails.

Prior to the 1928 amendment, it was immaterial what shorter or cheaper routes existed. The United States was entitled to free transportation between the terminals, and there was no reason to inquire as to which route was used. There is no reason to believe that a contract benefit, then applicable indifferently to either route, was, by virtue of its gratuitous modification in favor of petitioner, made applicable to one route only. The Act of 1928 altered the benefit to which the United States was entitled only with respect to the amount of that benefit; it was entitled before to free transportation, and thereafter it was entitled to transportation at 50 per cent of the published tariff.

At the time of its construction petitioner was the only railroad between East Portland, Oregon, and Roseville, California. A fair inference is that the parties supposed it would constitute the main line between those points, that the rate over that line would constitute the lowest through rate between the terminals, and that traffic routed over that line would receive not only the most efficient but also the most economical type of service between the terminals.

Under this Act the land was granted to the railroad for the transportation of property and troops from Portland to points south; that is, from Portland to Black Butte and intermediate points, and beyond Black Butte to Roseville, California, and intermediate points. By what means they were transported was of no consequence. The only thing in which the United States was interested was in getting the goods from one place to the other, and, therefore, it can make no difference whether the Railroad Company chose to transport it to Roseville by the Natron cut-off, or entirely over the Siskiyou route.[4]

[4] It is, of course, true that the United States could not have required the petitioner to have transported goods from Portland to Klamath Falls or any other point on the Natron cut-off north of Black Butte without paying compensation therefor, but for transportation to points south of Black Butte it could make no difference to the United States by which route it was transported.

The 1928 Act, the caption of which states that it is for the relief of the Southern Pacific Railroad, provided, in effect, that the United States in the future would pay for transportation in an amount equal to fifty per cent of the amount charged private carriers. Accordingly, until November 11, 1931, the same charge was asserted against the United States by the petitioner for transportation of its goods whether they were transported over the Siskiyou route or over the Cascade route. This, of course, was proper because the thing for which the United States had contracted originally was the transportation of its goods from Portland to points south, and this irrespective of the route by which it was transported.

The United States hardly can be considered by the Act of 1928, not only to have agreed to pay the petitioner the same rate as that paid to other 50 per cent land-grant roads, but, in addition, to have waived its right to the economical use of the line which it had subsidized on the understanding that it would be recompensed by future benefits.

II

THE ADMINISTRATIVE CONSTRUCTION OF THE STATUTES

For something more than half a century, similar statutes have received a substantially consistent administrative construction which has long since become settled.

On April 17, 1888, the Comptroller of the Treasury ruled (3 Dig. Dec. 2d Comp. 299):

> If a railroad have a line between two points aided in whole or in part, and subsequently acquire a new line or lines, nonaided, between those same points, the accounts for Government transportation, when performed over the new line or lines, shall be stated in the same proportion of aided to nonaided miles as though the transportation were over the original line.

This rule has become settled in the settlement of accounts for transportation of Government property and troops. In one of the earliest rulings (5 Comp. Dec. 364 (1899)), it was applied with respect to the transportation of an employee of the respondent by the petitioner from Sacramento to San Francisco via Benitia, the shortest and cheapest route, rather than via Stockton and over aided road. In another instance, the Comptroller had to deal with a situation where, by reason of a change in the course of the river, the railroad used a different route, with an advantage of 18.013 per cent in its favor in the land-grant deduction (17 Comp. Dec. 633 (1911)). He held (p. 635):

> The principle underlying these decisions is that where a contract is fully executed by one party thereto the obligation incurred thereby is binding upon the other party.
>
> I do not understand that the railroad company has surrendered the grants and other

> benefits received from the Government; therefore the obligation to furnish transportation * * * should remain as originally fixed upon the acceptance of the grant. I see no reason for relieving the railroad company of its obligations voluntarily incurred by acceptance of the grant, the full benefit of which it still retains.

In 21 Comp. Dec. 238, 239 (1914), the Comptroller held that the Government was not to be deprived of the benefits of the original grant by the building of new lines which reduce the proportion of the original land-grant deduction. In 24 Comp. Dec. 193, 194 (1917), he held that the rule relates to the percentage of the deduction, and not to the rates charged at the time or prior to the shortening of the line. In 10 Comp. Gen. 552, 554 (1931), the Comptroller General held:

> * * * The principle is well established in a long line of decisions of this office, with which the courts have agreed, that when a land-grant road, for purposes of its own, builds cut-offs and uses substituted mileage for the land-grant mileage, the transportation over such substituted mileage is subject to the same conditions which would apply had there not been the substituted mileage. * * *

In 15 Comp. Gen. 614 (1936) the Comptroller General considered a shipment from Los Angeles, California, to Pasco, Washington. The line from Portland to Pasco, operated by the Northern

Pacific, is subject to deductions. The railroad claimed that the Portland to Pasco through rate was limited by its filed tariff to a non-aided line, and that the combined rates beyond another point should be applied. The Comptroller General held, in line with the established practice, that since the non-aided line was a lieu line of the Northern Pacific, the charges on it were subject to the original deduction, and that the fact that the tariff rate was restricted to a particular line could not operate to deprive the Government of the full deduction.[5]

The principle, conclusively established by these decisions, applied to and was acquiesced in by all land-grant railroads, and by the petitioner, after it joined, by statute, the class of roads receiving compensation. See *United States* v. *Northern Pacific Ry. Co.*, 30 F. (2d) 655, 660 (C. C. A. 8th). Petitioner insists there was no acquiescence on the part of the railroads. It finds this protest in the fact that many of the rulings of the Comptroller or Comptroller General were occasioned by the protest of the railroads. But, too plainly for dispute, the very absence of litigation such as that here insti-

[5] Compare *L. & N. R. R.* v. *United States*, 273 U. S. 321, in which this Court held that the administrative practice of the accounting officers of the respondent in making land-grant deductions from party rates, rather than from individual rates for passengers, was proper, even when tariffs restricted the party rates to cash purchases and provided that no land-grant deductions should be made.

tuted by petitioner demonstrates acquiescence in the rulings after they were made.*

The petitioner seeks to distinguish these rulings on the ground that they were applied to bond-aided railroads or involved the abandonment of the land-grant line for through traffic. The basic principle set forth in these decisions is, we submit, applicable to the case at bar. Petitioner does not explain why either distinction should produce a different result. (a) It is plainly a matter of indifference whether the consideration for the reduced or free rates is aid by the grant of land or by the donation of bonds. (b) If the original line is abandoned, rather than continued as an alternative route with higher tariffs, the Government obtains the deduction over a non-aided route because of a promise of a terminal-to-terminal benefit. The reasoning is equally applicable to the establishment of a cheaper alternative route. Petitioner's position, which is necessarily based upon the theory that the deduction applies only to particular trackage, can no more be squared with the administrative ruling upon abandoned lines than it can with the decision below.

It should be noted that, even if abandonment of the old route were necessary for application of this settled rule, the petitioner has, for practical purposes, abandoned the Siskiyou route so far as

* The litigation in the *Northern Pacific* case, *supra*, is an exception to this general record of acquiescence; perhaps one should also note the threat, never acted on, to contest the ruling in 15 Comp. Gen. 614, 615.

through traffic is concerned.[7] The increase of 100 per cent over the rates published for the Cascade route on through shipments of water-competitive traffic between Portland and San Francisco in every substantial sense closed that line to prospective users. And, as to traffic of all classes, the court below found that no through express freight service was maintained over the Siskiyou route, but that the service consisted of one local freight each way between Black Butte, California, and Springfield Junction, Oregon[7] (R. 16).

The petitioner contends that the terms of its contract with the respondent are so clear as to permit no change by administrative construction. Even if the contracts were as clear as petitioner implies (but see *supra*, pp. 14–18), no attempt is made to change the terms of the contract. What the Comptroller's settled practice serves to accomplish is to define the obligations of the contracts in terms so broad as to prevent an evasion of its spirit by the carriers. The obligation of the carrier, which is a continuing one, regardless of the necessary changes and developments in the course of years (3 Comp. Gen. 267, 268) has been defined and settled by administrative practice over a period of fifty years, unchanged by any expression on the part of Congress.

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[7] The occasional use of the Siskiyou route by petitioner for reasons of economy, to relieve traffic on the Cascade route, was done at Cascade rates and on petitioner's own motion (see *supra*, p. 3).

It is, of course, settled that the long-continued uniform, practical application of a statute by the authorities administering it is entitled to great weight, and will not be disturbed by the courts except for cogent and persuasive reasons. *United States* v. *Shreveport Grain and El. Co.*, 287 U. S. 77, 84. See *Swendig* v. *Washington Co.*, 265 U. S. 322, 331; *Wisconsin* v. *Illinois*, 278 U. S. 367, 413. Petitioner has advanced no reason why there should, after fifty years, be a judicial revision of the administrative practice.

In fact, this practice was specifically approved by the Circuit Court of Appeals for the Eighth Circuit in *United States* v. *Northern Pacific Ry. Co.*, 30 F. (2d) 655, rehearing denied, 32 F. (2d) 698. In that case a cut-off line from the original aided line was constructed, materially shortening the distance between two terminals there involved. "Since the construction of this short line between Little Falls and Staples, the route via Brainerd has been used for local traffic exclusively; the through traffic from St. Paul to the Pacific Coast being routed via the shorter line between Little Falls and Staples" (p. 657). The Government contended, there as here, that the railroad had, in effect, established a lieu line, and had as effectually closed the longer route to through Government traffic as if the rails had been removed. The court, in reversing a judgment for the railroad, referred with approval to the consistent practice of the government accounting officers in computing payments to aided

railroads, and held that an aided railroad could not, by subsequent construction of cut-offs and withdrawal of through service, deprive the United States of its right to deductions from the through rate on the basis of the land-grant ratio established when the railroad was first constructed.[8]

The petitioner urges that the new line did not constitute a cut-off, but a new route (Br. 32). We cannot see that the controversy is in any manner affected by the characterization of the new trackage as a "cut-off" or as a "lieu route." In either case, the basic issue remains whether the land-grant deduction applies to terminal-to-terminal carriage or to transportation over particular trackage. If a deviation from an original land grant, whether brought about by lieu routes or by cut-offs, be accepted as an absolution of the railroad from land-grant deductions, then, as the court stated in the *Nothern Pacific* case, *supra,* p. 659, "it would be easy, under the rule thus laid down, by degrees to whittle away the reserved rights of the government."

Petitioner urges that the administrative practice is not uniform, and relies on 7 Comp. Dec. 224

[8] The court stated (p. 659) that by its conduct the road deprived the United States "of one of the most important considerations for its grant, to wit, speedy, through transportation to the coast, unless it accepts fare reductions not in harmony with the legislation as construed by the parties to the contract over a long period." Compare Section 2 of the Act of July 25, 1866, *infra.*

(1900) and 8 Comp. Dec. 474 (1902). But the ruling in these cases was, whether accurately or not, restricted in the latter decision to cases where the government officer fails to specify the route over lines constructed by independent railroads from a common terminal to different points, which lines are subsequently projected to a second common point, and the roads subsequently come under common control.

It is submitted, therefore, that the recognized and established administrative practice consisting of the application of the original land-grant deduction proportion to any cut-off or lieu line constructed by a railroad, defines and determines the scope of the obligations of the statutory contract and should not after half a century be disturbed by the courts.

III

THE PRACTICAL CONSTRUCTION OF THE PARTIES

It is settled law that the practical interpretation of a contract by the parties thereto for any considerable period of time before it becomes the subject of controversy is of great, if not controlling, weight and creates in effect an estoppel. *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, 118. As this Court said in *Insurance Co.* v. *Dutcher*, 95 U. S. 269, 273:

> The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what

> parties meant, than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former. * * *

It is respectfully submitted that in the instant case the conduct of all the parties leads to the inevitable conclusion that there was general agreement concerning the correct interpretation of petitioner's obligations.

The respondent has described in the preceding point the practice of its accounting officers. There can be no doubt that almost without exception the railroads subjected to the administrative practice have acquiesced in it, as shown by the fact that there apparently has been no litigation, with the exception of the *Northern Pacific* case and the instant case.

Even in the case of the petitioner, there has been a long period in which it has accepted this administrative construction of the statutes and the contract. The record reveals that in the period during which the petitioner was entitled to compensation, from September 1, 1926, the date of the completion of the Cascade route, to November 11, 1931, the date when the new rates were to become effective, the petitioner assessed charges against the respondent upon the basis of the full land-grant deduction proportion over the original

route (R. 20). The record does not explicitly show what route was used to transport government shipments made during that period; but the petitioner had issued instructions to route through traffic between San Francisco and Portland over the Cascade route, principally for the reason of economy (R. 16). It reasonably follows from this that unrouted traffic of the United States, both prior and subsequent to 1931, was transported over the Cascade route. Even at the present time the 75 per cent of the through traffic for which the tariff rates are the same over both routes undoubtedly moves over the Cascade route. Yet where the petitioner has in fact transported property of the United States over the Cascade route, it has not, prior to November 11, 1931, undertaken to charge on the percentage of land-grant mileage actually used on that route, but has applied the percentage of the Siskiyou route.[9] This, we submit, constitutes the practical interpretation of the contract which the parties themselves have placed upon it.

There should also be noted a statement made by the spokesman for the petitioner at the hearing[10]

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[9] If the petitioner's own argument be adopted in respect of the percentage of land-grant deduction of mileage actually used in the instant case, the respondent was entitled to a deduction of at least 24.182 percent, since the freight was actually transported over a combination of lines comprising that proportion of land-grant deduction lines, instead of the 17.802 percent claimed by petitioner (R. 10).

[10] Hearing before a Subcommittee of the Committee on Interstate and Foreign Commerce, House of Representatives, 70th Cong., 1st Session, on H. R. 10162, Mar. 31, 1928.

on H. R. 10162, the companion bill of the Act of May 23, 1928, *infra*, p. 40. Mr. Ben C. Dey, appearing for the Southern Pacific Company, after stating the inequalities arising from the "free haul" provisions of the land-grant statute (Act of July 25, 1866, *infra*, p. 39), said (p. 19):

> * * * We have just completed between Black Butte, Calif., and Eugene, Oreg., a new line commonly called the Natron Cut-Off, at a cost of $40,000,000. It is an alternate route to the land-grant route, and yet we take all the Government business that is routed that way absolutely free, the same as we do on the green line [apparently the Siskiyou route], and when the green line is made a 50 per cent line, of course the Government will have the choice of either of those routes at 50 per cent.

That statement made on behalf of the petitioner[11] concedes that after the completion of the Cascade route, and before the enactment of the Act of May 23, 1928, the petitioner considered it an obligation under its contract with the respondent to apply the free-haul provision of the contract to the new route.

It is further supported by the Senate and House Committee reports on S. 3699, the Act of May 23, 1928, and H. R. 10162, the companion bill. The Senate report (Sen. Rep. No. 698, 70th Cong., 1st Sess.) states, in part, that the proposed relief is

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[11] See also statement of Representative W. C. Hawley, author of the bill, at page 33 of the Hearing.

"designed only to permit this railroad to charge for future Government transportation 50 per cent of the published tariff rates which is the same basis now applicable to practically all other land-grant railroads of substantial mileage." No distinction is drawn in the report between the two routes. The House report (House Rep. No. 1538, 70th Cong., 1st Sess.) states that the acceptance of the land-grant obligated the railroad to the free transportation privilege of the Government forever, but that the inequality should be removed and that the "Government can not reasonably require a rate more favorable than 50 per cent of the ordinary tariff." The report of the Interstate Commerce Commission, annexed to the House report, specifically states that the purpose of the bill is to secure to the *lines* of the Southern Pacific between East Portland, Oregon, and Roseville, California, compensation at the rate awarded to other aided railroads.

The testimony of the petitioner's representative before the House Subcommittee is not offered here to interpret an Act of Congress; it is offered to show the practical construction placed on the contract by the parties. Cf. *Securities & Exchange Com'n* v. *Robert Collier & Co.*, 76 F. (2d) 939, 941 (C. C. A. 2d).

Indeed, it may well be argued that the statement of the petitioner's representative assuring the committee that the Government would not be further

harmed by the gratuitous release of its contractual rights, estops the petitioner from attempting to deprive the respondent of the full measure of benefit which Congress intended it to retain, and had every reason to believe from the petitioner's representations, that it would retain, should the petitioner be granted relief from the free-haul obligation of the original contract.

IV

THE RATE ORDERS OF THE INTERSTATE COMMERCE COMMISSION

Petitioner urges throughout its brief that it had attempted to lower rates over the Siskiyou route, that the Interstate Commerce Commission had refused permission, and infers that it was authorized to lower its rates only over the Cascade route and compelled to raise its rates over the Siskiyou route. From this it draws the conclusion that, since the Commission compelled it to charge higher rates over the land-grant route, the respondent hardly can complain that it has not the land-grant benefits over the low-rate route (Br. 17, 18–19, 25, 44–49).

Even if the premises were true, the conclusion would not follow. If we assume a refusal of the Commission to allow lowered rates, this does not work a compensatory release of petitioner's obligations to the United States. Such a primitive theory of retaliation would equally release petitioner's obligations if, for example, the Commis-

sioner of Internal Revenue were to assess and collect taxes which were too high. The land grants placed petitioner under one obligation to the United States; the Interstate Commerce Act and its regulations create a wholly independent congeries of relationships and duties. Compare *United States* v. *U. P. R. R.*, 28 I. C. C. 518, 524.

But, in point of fact, petitioner mistakes the orders of the Interstate Commerce Commission upon which its argument is based.

The rate on shipments between Portland, Oregon, and San Francisco, California, over the petitioner's lines have always been influenced by the fact or threat of water competition. In order to meet such competition the petitioner after the completion of the Siskiyou route in 1887 maintained a low rate between those terminals so as to compete with the coastwise shipping tariffs. From time to time, as amendments were made to the Interstate Commerce Act relating to the so-called "Fourth Section Orders," hearings were had to determine the rate which might be charged. In 1912 and in 1922 hearings were had at which certain through rates were authorized. (22 I. C. C. 366; 24 I. C. C. 34.) In 1927 the Interstate Commerce Commission granted to the petitioner authority to maintain certain rates between the ports lower than the rates to intermediate points (129 I. C. C. 3). These rates, based on the distance and operating costs of the Siskiyou route, the petitioner did not accept, on the ground

that the minimum rates authorized by the order of 1927 were too high to enable it to compete with water traffic. The Cascade route was completed in 1926, and upon the basis of its lower operating costs, the petitioner obtained a reopening of the decision of the Interstate Commerce Commission (R. 16–18).

After hearing upon the reopened applications, the Interstate Commerce Commission ruled that the transportation between the ports of Portland, Oregon, and San Francisco, California, must be reasonably compensatory, and that such compensation must be reflected by a rate which would yield a minimum carload revenue of six mills a ton-mile, where the carload minimum weight is 40,000 pounds or over, and 12¢ a car-mile where the minimum weight is under 40,000 pounds. 165 I. C. C. 373, 410–413. In computing the earnings, the distance over the operating route over which the rates should be applied should govern. With reference to class rates, the Commission ruled that a certain minimum differential over the lowest water rates should be maintained. The only other limitation placed upon the authority of the petitioner was that the rates to intermediate points should not exceed by more than 100 per cent the through rates between the ports.

The petitioner contends that the decision of the Commission compelled it to increase the port-to-port rates over the Siskiyou route to 100 per cent over those charged for water-competitive traffic

over the Cascade route. But the order of the Commission had no such effect.

In the first place, so far as the Commission order was concerned it could be applied indifferently either to the Siskiyou or to the Cascade route. It is true that the carrier's evidence was presented on the basis of alternative routes, both of which were over the Natron cut-off and one of which apparently used the California cut-off of the Cascade route and the other the Siskiyou route (165 I. C. C. at 382). But this, of course, does not mean that the order was so restricted. In the opinion there is nothing to indicate that the Commission was limiting its Fourth Section relief to the Cascade route. There are many indications that it was terminal-to-terminal relief. (a) Throughout the opinion it speaks of rates between the ports, and not over designated routes. (b) In prescribing the minimum through rates, in terms of distance, the Commission said (p. 410) "the distance over the operating route over which the rates are to be applied shall govern." This plainly implies that the carrier could choose its own route. (c) It provided that intermediate rates should not exceed the through rates by more than 100 percent. Petitioner has viewed this as applicable to the intermediate rates on the Siskiyou route (R. 20). If this be the case, the through route which passes through the Siskiyou intermediate points must of necessity be included in the Commission order. (d) Petitioner urges that the previous Fourth Section relief granted over the

Siskiyou route in 1912 was vacated by this order of 1930 (Br. 47). But the order merely vacated previous Fourth Section orders "to the extent they are in conflict with the findings herein" (p. 413). If the 1930 order applied only to the Cascade route it contained nothing to conflict with the earlier Siskiyou through rates. (e) The 1930 order was subsequently modified in manners not here material in two further opinions. In each opinion it was described as an order which "affirmed," with modifications, the 1927 grant of Fourth Section relief (129 I. C. C. 3) which petitioner chose not to accept. 173 I. C. C. 577; 190 I. C. C. 273, 274. Since the 1927 order related to the Siskiyou route, it is difficult to see how its modification and affirmance in 1930 can be a denial of all relief to the Siskiyou route.

It seems, therefore, rather clear that the Fourth Section relief granted in 1930 was applicable to the Siskiyou as well as to the Cascade route.

Since the requirement as to minimum rates was placed on a mileage basis, the minimum Cascade rates between Portland and San Francisco would be 725.03/774.86 of the minimum rates allowed over the Siskiyou rate; this indicates a compulsory differential of about 6.5 per cent, instead of the 100 per cent instituted by the petitioner.[12]

[12] It may be noted that in 190 I. C. C. 273 the Commission granted the same authority to the Northern Pacific to meet water competition between San Francisco and Portland. It recognized (p. 290) that the somewhat longer distances would require somewhat higher minimum rates.

In the second place, even if the authority were restricted to the Cascade route, there was no compulsion upon the petitioner to raise the Siskiyou rates to 100 per cent over the Cascade rates. The Commission's order said that the intermediate rates could not be more than 100 per cent higher than the low through rates. This did not *require* the railroad to charge for its intermediate rates double the through rates. Even if the petitioner considered itself unable to apply the Fourth Section relief to the Siskiyou route, necessitating the through rate to be the sum of the intermediate rates, it cannot show any compulsion to make the intermediate rates double the throu h Cascade rate, with the result that the through Siskiyou rates were markedly increased with respect to water-competitive traffic. Petitioner had equal authority to reduce the intermediate rates to a point corresponding to the low through rates, as the Commission indicated in its opinion (165 I. C. C. at 396–397). Accordingly, there was no compulsory increase of the Siskiyou through rates and petitioner's argument based upon that theory necessarily fails.

The net result is that while the Siskiyou rates may be lower than maximum reasonable rates, they are excessive as applied to the only shipper compelled under the petitioner's theory of land-grant deductions to use that route. For it is obvious that a person desiring to send through freight between Portland and San Francisco would not designate the Siskiyou route. In fact, it is difficult to under-

stand why through rates are published over the Siskiyou route between Portland and San Francisco for any purpose other than to constitute a paper route for the purpose of increasing the charges on Government shipments. Therefore, the higher rates over the Siskiyou route are in fact and effect artificial rates constituting an indirect attempt to apply a special tariff to Government shipments. Cf. *Southern Pacific Co.* v. *United States,* 272 U. S. 445. Such artificial rates, it is respectfully submitted, should not affect the advantage over private shippers for which the respondent had paid consideration in grants of land. *Southern Pacific Co.* v. *United States,* 237 U. S. 202. If petitioner's theory were accepted, this contractual benefit might wholly be eliminated whenever the railroad should choose to establish an alternative route.

CONCLUSION

It is respectfully submitted that the decision of the court below is correct, and should be affirmed.

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MARCH 1939.

APPENDIX

Act of July 25, 1866, c. 242, 14 Stat. 239, 240–241, provides in part as follows:

> *An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from the Central Pacific Railroad, in California, to Portland, in Oregon.*
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled;* That the "California and Oregon Railroad Company," * * *, and such company organized under the laws of Oregon as the legislature of said State shall hereafter designate, be, and they are hereby, authorized and empowered to lay out, locate, construct, finish, and maintain a railroad and telegraph line between the city of Portland, in Oregon, and the Central Pacific Railroad, in California, in the manner following, to wit: The said California and Oregon Railroad Company to construct that part of the said railroad and telegraph within the State of California, beginning at some point (to be selected by said company) on the Central Pacific Railroad in the Sacramento valley, in the State of California, and running thence northerly, through the Sacramento and Shasta valleys, to the northern boundary of the State of California; and the said Oregon company to construct that part of the said railroad and telegraph line within the State of Oregon, beginning at the city of Portland, in Oregon, and running thence southerly through the Willamette, Umpqua, and Rogue River val-

leys to the southern boundary of Oregon, where the same shall connect with the part aforesaid to be made by the first-named company: * * *.

Sec. 2. *And be further enacted,* That there be, and hereby is, granted to the said companies, their successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the line of said railroad, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile (ten on each side) of said railroad line; * * *.

* * * * *

Sec. 5. *And be it further enacted,* That the grants aforesaid are made upon the condition that the said companies shall keep said railroad and telegraph in repair and use, and shall at all times transport the mails upon said railroad, and transmit despatches by said telegraph line for the government of the United States, when required so to do by any department thereof, and that the government shall at all times have the preference in the use of said railroad and telegraph therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States.

The Act of May 23, 1928, c. 720, 45 Stat. 722–723, provides:

> Chap. 720.—An Act For the relief of the land-grant railroad operated between the station formerly known as East Portland, in the State of Oregon, and Roseville, in the State of California.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the land-grant railroad heretofore operated, and now being operated, between the station formerly known as East Portland, in the State of Oregon, and Roseville, in the State of California, shall hereafter receive compensation for transportation of property and troops of the United States at the same rate as is paid to land-grant railroads organized under the Land Grant Act of March 3, 1863, and the Act of July 27, 1866 (chapter 278): *Provided,* That the Congress hereby reserves the right at any time by law to prescribe such charges as it deems advisable for such Government transportation.

The Act of March 3, 1863, c. 98, 12 Stat. 772, 773, provides, in part, as follows:

> *An Act for a Grant of Lands to the State of Kansas, in alternate Sections, to aid in the Construction of certain Railroads and Telegraphs in said State.*
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> * * * * *
>
> SEC. 3. *And be it further enacted,* That the said lands hereby granted to said State shall be subject to the disposal of the legislature thereof, for the purposes aforesaid, and no other; and the said railroads and branches shall be and remain public highways, for the use of the Government of the United States,

free from all toll or other charge upon the transportation of any property or troops of the United States.

The Act of July 27, 1866, c. 278, 14 Stat. 292, 297, provides, in part, as follows:

An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast.

* * * * *

SEC. 11. *And be it further enacted,* That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval, and all other government service; and also subject to such regulations as Congress may impose restricting the charges for such government transportation.

U. S. GOVERNMENT PRINTING OFFICE: 1939

Map op. p. 4 of dissent

SUPREME COURT OF THE UNITED STATES.

No. 613.—October Term, 1938.

Southern Pacific Company, Petitioner, vs. The United States. } On Writ of Certiorari to the Court of Claims.

[May 29, 1939.]

Mr. Justice Reed delivered the opinion of the Court.

This case involves the right of the Government to deduct from the public terminal-to-terminal tariffs of a railroad over a route, partly of land-grant aided mileage, identical with part of the mileage of another earlier constructed route of the same road between the same terminals, sums based upon the higher proportion of land-grant aided mileage in this latter route. On account of the importance of the question in administration, certiorari was granted.[1]

The carrier owns and operates two lines of railroad between Portland, Oregon, and Roseville, California, and Davis, California, both southern points being on the Central Pacific, now the Southern Pacific, Railroad in California. From the California junctions, there is direct connection over the same Southern Pacific rails into San Francisco. The older line is called the Siskiyou, the newer the Cascade Route. For a considerable portion of the distance between Portland and San Francisco, the two routes are identical. There are two differences; one is between Eugene, Oregon, and Black Butte, California. On the west the Siskiyou Route passes through Grant's Pass and Siskiyou, a distance of 300 miles, to connect Eugene and Black Butte. The eastern, or Cascade Route, joins the same two points by a shorter (275 miles) line through Natron and Klamath Falls. The second deviation is between Tehama, California, and

[1] Cf. Schedule of Land Grant and Bond-Aided Railroads of the U. S., Office of the Quartermaster General of the Army, Circular No. 4, February 1, 1922. This shows the land-grant mileage in the United States at the date of issue. In order to obtain a share of government traffic, non-land-grant roads have entered widely into freight land-grant equalization agreements by which they agree to carry freight, routed over their lines at "the lowest net rates lawfully available, as derived through deductions account of land grant distance. . . ." Cf. Circular 3, Feb. 6, 1935, Office of Quartermaster General, War Department, Freight Land Grant Equalization Agreements.

Davis and Roseville respectively. Here the Siskiyou Route is to the east, 104 miles long, and the Cascade Route to the west, 110 miles.

Where the routes are identical, some of the mileage is land-grant aided. Some is not. The mileage of the Siskiyou which is different from the Cascade is largely land-grant aided. None of the Cascade Route, except where it uses the same rails as the Siskiyou, has land grants. Based on the proportion of aided mileage and the percentage of deduction allowed to the Government from the tariffs charged private shippers, the United States, between San Francisco and Portland, is entitled to a land-grant deduction via the Siskiyou Route of 42.792 per cent. Via the Cascade Route, the deduction is 17.801 per cent. There are slight variations for East Portland.

During December, 1931, and January, 1932, the carrier transported, in both directions, certain property of the United States on Government bills of lading from Portland or East Portland to San Francisco. No directions were given by the Government as to the routes over which the shipments were to move. While before November 11, 1931, the terminal-to-terminal rates over the two routes were the same, after that date authorized revisions resulted in a rate competitive with water borne commerce over the Cascade and a higher rate over the Siskiyou. These public tariffs were so much lower over the Cascade than they were over the Siskiyou Route, that the net cost to the Government, after the deductions deemed applicable by the railroad, was less over the Cascade than it was over the Siskiyou, despite the higher percentage of deduction allowed the latter route.

The Government was billed on the Cascade tariffs with deductions for land-grant mileage of about 17 per cent. It paid on the basis of the Cascade tariffs but deducted on the ratio of the land-grant to total miles between the terminals on the Siskiyou Route, or some 42 per cent. The Government claims that it is entitled to the lowest rate, between the terminals, less the percentage of deduction over the original land-grant aided route. The carrier protested and brought this action in the Court of Claims to recover the difference between the Cascade tariffs less the Cascade ratio of land-grant mileage and that paid by the Government, the Cascade tariffs less the Siskiyou ratio. The Court of Claims, after making special findings of fact, adjudged that the carrier was not entitled to recover and dismissed its petition.

The Government obtained concessions from the established tariffs by virtue of the acceptance by the carrier of grants of land, ten alternate sections per mile on each side of the line, to aid in the construction of a railroad as described in the statute authorizing the conveyance.[2] This statute was similar in form to the land grant construed in *Burke* v. *Southern Pacific Railroad Company*[3] and upon compliance with its requirements became a contract, "obligatory on both"[4] the carrier and Government. The carrier agreed it should "be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States." The authorization was "to lay out, locate, construct, finish, and maintain a railroad and telegraph line between the city of Portland, in Oregon, and the Central Pacific Railroad, in California . . ." The road was located in accordance with these requirements.

In December, 1887, the Siskiyou Route was finished. The road running from its southern terminus at Roseville to San Francisco had been finished in 1870. This gave a through route from San Francisco to Portland, 774.16 miles long with 663.16 land-grant aided. The Cascade Route was built later in small sections primarily for local service or links in other projected distinct railroad undertakings. The California deviation from the Siskiyou between Tehama and Davis was finished in 1882. The Oregon section, forming with that portion of the Siskiyou an irregular ovoid figure, was put together between 1905 and 1926, being completed September first of the latter year. This route is 725.03 miles between Portland and San Francisco with 258.13 miles built with grants in aid. Each route is necessary for adequate transportation service to the areas traversed. At the time of the completion of the Cascade and until November 10, 1931, the tariffs over the two routes between the terminals were the same.

On May 23, 1928, there was enacted an act for the relief of the land-grant railroad operated between East Portland, Oregon, and

[2] Act of July 25, 1866, 14 Stat. 239.

[3] 234 U. S. 669.

[4] *Id.* 680; cf. United States v. Central Pacific R. R., 118 U. S. 235, 238.

Roseville, California.[5] As Roseville is the junction terminal of the Siskiyou and is not served by the Cascade, this description covers only the Siskiyou line built under the 1866 act. By its terms, the Government relinquished its privilege of free transportation and accepted in lieu thereof a right to the same rate as is paid to other land-grant roads. This is fifty per cent of the public tariff for land-grant aided mileage.[6]

The Act of 1866, granting the aid, specified, only generally, the route of the new road. It was to begin at some point on the Central Pacific Railroad in the Sacramento Valley and thence run northerly to Portland. By the grant of millions of acres of public lands, the Government prepaid for transportation[7] over the line, wherever it might be built. It was entitled to service for its property or troops without further cost from whomsoever owned or operated the aided facility between the Central Pacific and Portland.[8] By the 1928 act, the Government agreed, for the "relief of the land-grant" road, to put it upon the same basis as other land-grant roads. By this concession, no change was made in the extent of the obligation to give land-grant service.

The two acts are quite clear in their requirement that the company which constructed the road or its successors in ownership or operation should transport the property or troops of the United States over the railroad at the rate fixed by their provisions. The uncertainty as to the meaning arises in the application of the right of transportation to the mileage. On completion of the original project between Portland and the Central Pacific, there was a definite right of way, the present Siskiyou Route, with every mile

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[5] The Act of May 23, 1928, c. 720, 45 Stat. 722-723, provides:

"Chap. 720.—An Act For the relief of the land-grant railroad operated between the station formerly known as East Portland, in the State of Oregon, and Roseville, in the State of California.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the land-grant railroad heretofore operated, and now being operated, between the station formerly known as East Portland, in the State of Oregon, and Roseville, in the State of California, shall hereafter receive compensation for transportation of property and troops of the United States at the same rate as is paid to land-grant railroads organized under the Land Grant Act of March 3, 1863, and the Act of July 27, 1866 (chapter 278): *Provided,* That the Congress hereby reserves the right at any time by law to prescribe such charges as it deems advisable for such Government transportation."

[6] Lake Superior & Mississippi R. R. Co. *v.* United States, 93 U. S. 442, 454, 455; L. & N. R. R. *v.* United States, 273 U. S. 321, 323. Act of June 7, 1924, c. 291, 43 Stat. 477, 486. This act determined the proportion of the regular tariff to be paid for the transportation.

[7] L. & N. R. R. *v.* United States, 267 U. S. 395, 402.

[8] Sec. 5, Act of July 25, 1866, 14 Stat. 240.

between East Portland and the Central Pacific aided by land grants. This same situation existed as to all or parts of other bond or land aided roads.[9] Soon there were changes and shortening of these lines. The Government was faced with the problem of the proper ratio of land-grant or bond-aided deductions or allocations to be applied where new non-aid mileage is used between terminals formerly served in a higher proportion by land-grant mileage. Cut-offs and the elimination of curves furnished occasion for these decisions. Thus in 1888 in a ruling as to transportation services rendered by the Central Pacific Railroad, where the Central had three lines from Sacramento to San Francisco, with

[9] The laws relating to land-grant and bond-aided railroads contain several types of conditions. The most prevalent condition was that "the said railroad shall be and remain a public highway for the use of the Government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States." This was construed to require the railroad to furnish only free use of the rails and permanent structures. Lake Superior & Mississippi R. R. Co. *v.* United States, 93 U. S. 442. It is to be found in the following acts: Act of Sept. 20, 1850, 9 Stat. 466 (Ill. Cent. R. R.; Mobile & O. R. R.); Act of June 10, 1852, 10 Stat. 8 (Chicago, B. & Q. R. R.; Missouri Pac. Ry; St. Louis & S. F. Ry.); Act of Feb. 9, 1853, 10 Stat. 155 (Chicago, R. I. & Pac. Ry.; St. Louis, Iron Mtn. & So. Ry.); Act of May 15, 1856, 11 Stat. 9 (Chicago & N. W. Ry.; Chicago, B. & Q. R. R.; Chicago, M. & St. P. Ry.; Chicago, R. I. & Pac. Ry.); Act of May 17, 1856, 11 Stat. 15 (Louisville & N. R. R.; Seaboard Air Line Ry.); Act of June 3, 1856, 11 Stat. 17, 18, 20, 21 (Ala. Great So. R. R.; Central of Ga. Ry.; Chicago & N. W. Ry.; Chicago, M. & St. P. Ry.; Chicago, St. P., M. & O. Ry.; Duluth, So. Shore & At. Ry.; Grand Rapids & Ind. R. R.; Grand Trunk R. R.; N. Y. Cent. R. R.; Louisville & N. R. R.; Mich. Cent. R. R.; Missouri, Kan. & Texas Ry.; Nashville, C. & St. L. Ry.; Pere Marquette R. R.; Southern Ry. Co.; Vicksburg, S. & Pac. R. R.); Act of Aug. 11, 1856, 11 Stat. 30 (Ala. & Vicksburg Ry.; Gulf & Ship Id. R. R.); Act of March 3, 1857, 11 Stat. 195 (Chicago & N. W. Ry.; Chicago, M. & St. P. Ry.; Chicago, St. P., M. & O. Ry.; Great No. Ry.; Northern Pac. Ry.); Act of March 3, 1863, 12 Stat. 772 (Atchison, T. & S. F. Ry.; Missouri, Kan. & Texas Ry.); Act of May 5, 1864, 13 Stat. 64 (Northern Pac. Ry.); Act of May 5, 1864, 13 Stat. 66 (Minneapolis, St. P. & S. Ste. Marie Ry.); Act of May 12, 1864, 13 Stat. 72 (Chicago, M. and St. P. Ry.); Act of March 3, 1865, 13 Stat. 526 (Chicago & N. W. Ry.; Chicago, M. & St. P. Ry.; Great No. Ry., Northern Pac. Ry.). Some of the grants went further and required the railroad to furnish free transportation. Act of July 1, 1864, 13 Stat. 339 (Missouri, Kan. & Texas Ry.); Act of July 3, 1866, 14 Stat. 78 (N. Y. Cent. R. R.; Mich. Cent. R. R.); Act of July 4, 1866, 14 Stat. 87 (Chicago, M. & St. P. Ry.); Act of July 25, 1866, 14 Stat. 239 (Southern Pac. Co.); Act of July 26, 1866, 14 Stat. 289 (Missouri, Kans. & Texas Ry.); Act of July 28, 1866, 14 Stat. 338 (Chicago, R. I. & Pac. Ry.; St. Louis, Iron Mtn. & So. Ry.). Others authorized the railroad to charge for Government transportation, subject to regulations which Congress might impose restricting such charges. Act of July 2, 1864, 13 Stat. 365 (Northern Pac. Ry.); Act of July 27, 1866, 14 Stat. 292 (Atchison, T. & S. F. Coast Lines; St. Louis & S. F. Ry.; Southern Pac. Co.); Act of March 3, 1871, 16 Stat. 573 (Southern Pac. Co.). The Act of July 1, 1862, 12 Stat. 489 (Missouri Pac. Ry.), provided for fair and reasonable rates for Government transportation, not to exceed the amounts paid by private parties for the same kind of service. See Schedule of Land-Grant and Bond-Aided Railroads of the U. S., Office of the Quartermaster General of the Army, Circular No. 4, February 1, 1922.

varying bond-aided mileages, the Comptroller of the Treasury ruled, when the road sought to render statements for the line actually used, that all United States accounts should be stated in terms of the bond-aided mileage of the original route. As the amounts due to the carrier were applied to retirement of the bonds in aid, this ruling preserved the charges for this purpose. This ruling has been followed in roads aided by land-grants.[10] The long continued administrative interpretation has decided weight in reaching a conclusion upon the construction of this contract,[11] particularly when the Congress after such interpretation gives up a right for free transportation between the terminals. Any doubt must be resolved in favor of the Government.[12]

The construction adopted in the Court of Claims was reached in *United States* v. *Northern Pac. Ry. Co.*[13] where there was a shortening of 94.24 miles in the through route between St. Paul and Seattle by means of a cut-off. In that case, too, the old route was maintained for local use.

It is urged, however, that in this instance we have a new line, an addition, rather than a cut-off in or a shortening or straightening of an original line.[14] So far as terminal-to-terminal transportation is concerned, the Cascade Route does not function as a new line or an addition. It is simply another way of carrying goods by the same railroad between San Francisco and Portland. By which route the shipment moves, is immaterial on the question of deduction for land grants. The conclusion that the lowest public tariffs are to have land-grant deductions based upon the proportion of the land-grant mileage in the original line, seems consonant with the purpose of the acts.

Affirmed.

Mr. Justice DOUGLAS took no part in the consideration or decision of this case.

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[10] (1888) 3 Dig. Dec. 2d Comp. 299. Followed in (1899) V Dec. of Comp. of Treas. 364; (1911) XVII Dec. of Comp of Treas. 633; (1914) XXI Dec. of Comp. of Treas. 238; (1917) XXIV Dec. of Comp. of Treas. 193; (1923) 3 Dec. of Comp. Gen. 267; (1931) 10 Dec. of Comp. Gen. 552; (1936) 15 Dec. of Comp. Gen. 614. But see (1900) VII Dec. of Comp. of Treas. 224; (1902) VIII Dec. of Comp. of Treas. 474.

[11] Cf. Fox v. Standard Oil Co., 294 U. S. 87, 96; Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U. S. 315, 329-30.

[12] Broad River Co. v. So. Carolina, 281 U. S. 537, 542

[13] 30 F. (2d) 655; rehearing denied, 32 F. (2d) 698.

[14] United States v. Kansas Pac. Ry. Co., 99 U. S. 455; United States v. Denver Pac. Ry. Co., 99 U. S. 460; United States v. Central Pacific R. R. Co., 118 U. S. 235.

SUPREME COURT OF THE UNITED STATES.

No. 613.—October Term, 1938.

Southern Pacific Company, Petitioner, *vs.* The United States. } On Writ of Certiorari to the Court of Claims.

[May 22, 1939.]

Mr. Justice Butler, dissenting.

The land-grant Act of July 25, 1866, and compliance with it constitute a contract.[1] This case calls for construction of a provision in § 5.[2] The court of claims sustained the government's deduction on account of land-grant mileage that is not included in or possibly attributable to the railroad over which the shipments moved. The inclusion, as a part of the aided railroad, of 275.6 miles of the Cascade Route between Springfield Junction, Oregon and Black Butte, California, is not permissible under the terms of the contract, nor is computation of the land-grant deduction from charges for transportation via Cascade on the percentage applicable to charges for transportation via Siskiyou warranted by constructions heretofore put upon like Acts. See (opposite p. 2) reproduction of map submitted as an exhibit at the argument in this Court.

I.

The grant was made to induce and aid construction of a railroad between Portland and some point to be selected by the grantees

[1] Lake Superior & Miss R. R. Co. *v.* United States, 93 U. S. 442. Union Pacific R. R. Co. *v.* United States, 104 U. S. 662, 664. United States *v.* Central Pacific R. R. Co., 118 U. S. 235, 238. Burke *v.* Southern Pacific R. R. Co., 234 U. S. 669, 680. United States *v.* Northern Pac. Ry. Co., 256 U. S. 51, 64. United States *v.* Galveston &c. Ry. Co., 279 U. S. 401.

[2] "And be it further enacted, That the grants aforesaid are made upon the condition that the said companies shall keep said railroad . . . in repair and use, and shall at all times transport the mails upon said railroad . . . for the government of the United States, when required so to do by any department thereof, and that the government shall at all times have the preference in the use of said railroad . . . therefor at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service. And said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States; and the same shall be transported over said road at the cost, charge, and expense of the corporations or companies owning or operating the same, when so required by the government of the United States." 14 Stat. 239, 240-241.

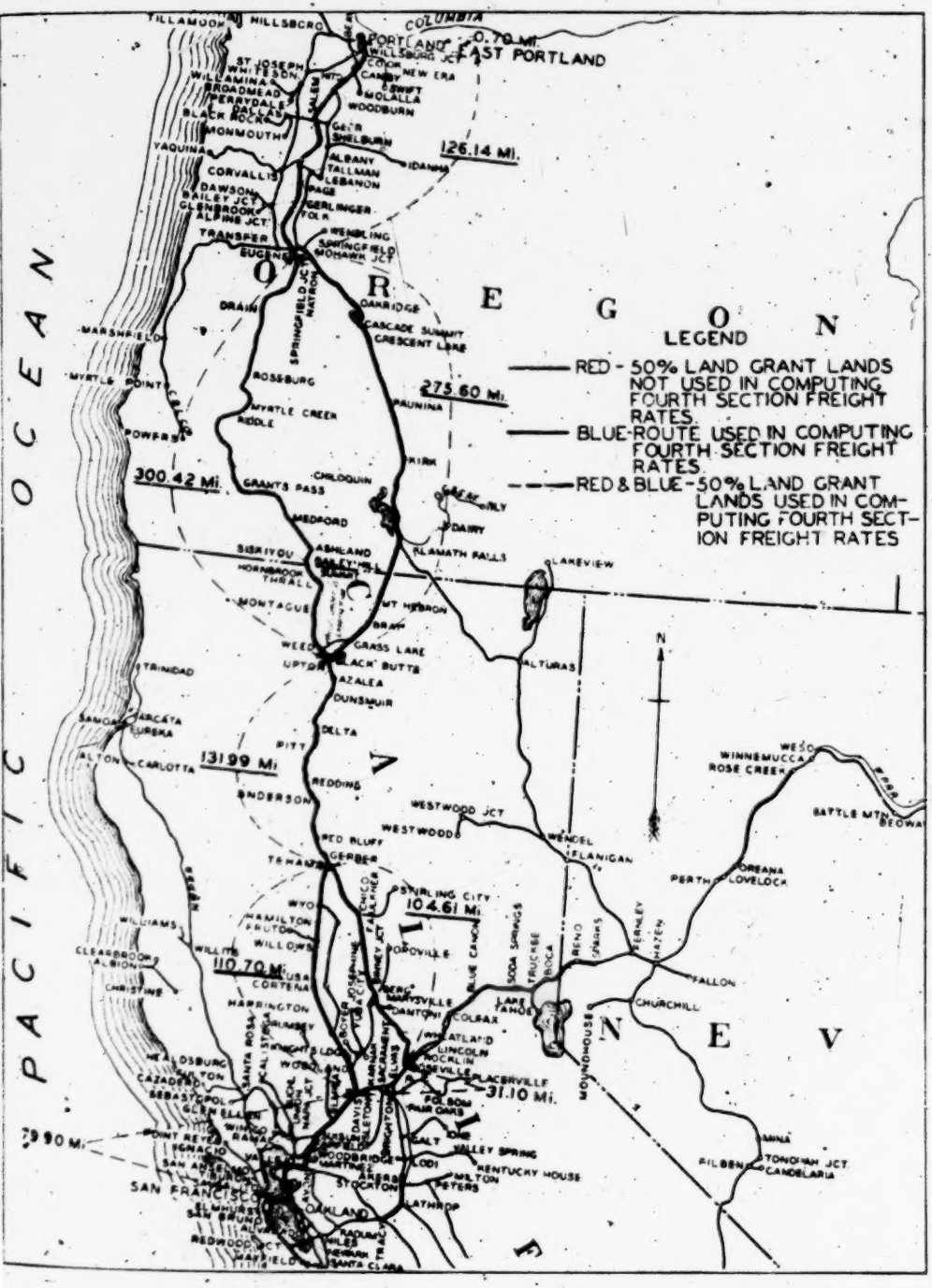
on the Central Pacific to serve the Willamette, Umqua, and Rogue River Valleys in Oregon, and the Sacramento and Shasta Valleys in California, and to be located as shown on maps made by the grantees and filed with the Secretary of the Interior. The railroad was located and constructed, and, since its completion in 1887, has been maintained and kept in use, in accordance with the contract. The aided portion is 663.13 miles long, extending between East Portland, Oregon and Roseville, California, a point on the Central Pacific east of Sacramento and about 111 miles from San Francisco. It is now called the Siskiyou Route.

Section 5 declares that the grantees shall keep "said railroad" in repair and use; that it shall be "a public highway" for the use of the United States; and that property and troops of the United States shall be transported over "said road" at the cost, charge, and expense of the corporations or companies owning or operating "the same", when so required by the government.

Plainly the contract applies only to the land-aided railroad between Portland and Roseville; not to the haul between Portland and San Francisco, nor to that between Roseville and San Francisco. The contract neither expresses nor implies any special undertaking by the carrier as to charges for government transportation between the port or terminal of Portland and that of San Francisco.

The Act of May 23, 1928[3] merely substitutes 50 per cent of the commercial charges for free transportation under § 5. Thus, as modified, the Act of 1866 requires plaintiff to furnish government transportation between points on and wholly via the land-grant railroad for one-half the charges applicable to like service for private parties. And for government transportation between a point on the aided railroad and one on another line there is deducted from charges generally made one-half the percentage that aided mileage attributable to that service is of the total miles hauled.

[3] "An Act For the relief of the land-grant railroad operated between the station formerly known as East Portland, in . . . Oregon, and Roseville, in . . . California. Be it enacted . . . That the land-grant railroad heretofore operated, and now being operated, between the station formerly known as East Portland, in . . . Oregon, and Roseville, in . . . California, shall hereafter receive compensation for transportation of property and troops of the United States at the same rate as is paid to land-grant railroads organized under the Land Grant Act of March 3, 1863, and the Act of July 27, 1866 (chapter 278) [pursuant to which such railroads transport government property at a charge of 50 per cent of the regular tariffs]: Provided, that the Congress hereby reserves the right at any time by law to prescribe such charges as it deems advisable for such government transportation."


PACIFIC OCEAN
OREGON
NEVADA
LEGEND
RED - 50% LAND GRANT LANDS NOT USED IN COMPUTING FOURTH SECTION FREIGHT RATES.
BLUE-ROUTE USED IN COMPUTING FOURTH SECTION FREIGHT RATES.
RED & BLUE - 50% LAND GRANT LANDS USED IN COMPUTING FOURTH SECTION FREIGHT RATES
126.14 Mi.
275.60 Mi.
300.42 Mi.
131.99 Mi.
104.61 Mi.
110.70 Mi.
31.10 Mi.
79.90 Mi.
0.70 Mi.
EAST PORTLAND
PORTLAND
COLUMBIA
SAN FRANCISCO
OAKLAND
STOCKTON
SACRAMENTO
RENO
TRUCKEE
SODA SPRINGS
LAKE TAHOE
FERNLEY
HAZEN
FALLON
CHURCHILL
WINNEMUCCA
ROSE CREEK
BATTLE MTN.
WENDEL
LANIGAN
ALTURAS
LAKEVIEW
KLAMATH FALLS
MEDFORD
GRANTS PASS
ROSEBURG
EUGENE
SALEM
ALBANY
CORVALLIS
TILLAMOOK
HILLSBORO
MARSHFIELD
COOS BAY
REDDING
RED BLUFF
WESTWOOD
WESTWOOD JCT
QUINCY
DAIRY
MONTAGUE
WEED
GRASS LAKE
BLACK BUTTE
TRINIDAD
ARCATA
EUREKA
CARLOTTA
DUNSMUIR
DELTA
ANDERSON
WILLOWS
WILLIAMS
CLEARBROOK
CHRISTINE
HARRINGTON
WOODLAND
DAVISVILLE
DAVIS
WINTERS
ROCKLIN
LINCOLN
PLACERVILLE
COLFAX
DANVILLE
SUISUN
VALLEJO
BENICIA
MARTINEZ
ANTIOCH
TRACY
LATHROP
MANTECA
LODI
GALT
IONE
VALLEY SPRING
KENTUCKY HOUSE
MILTON
PETERS
SANTA CLARA
SAN JOSE
REDWOOD JCT
NILES
HAYWARD
SAN LEANDRO
ALAMEDA
SAN MATEO
SAN RAFAEL
POINT REYES
PETALUMA
SANTA ROSA
HEALDSBURG
CLOVERDALE
WILLITS
UKIAH
CALPELLA
HOPLAND
CLEAR LAKE
LAKEPORT
CALISTOGA
NAPA
VALLEJO
CROCKETT
PITTSBURG
ANTIOCH
MOUNDHOUSE
PERTH
LOVELOCK
OREANA
WELLS
TONOPAH JCT
CANDELARIA
GERLACH
SPRINGFIELD
WENDLING
ALBANY
LEBANON
SWEET HOME
MOLALLA
NEW ERA
CANBY
OREGON CITY
GLADSTONE
MILWAUKIE
ST JOSEPH
WHITESON
WILLAMINA
BROADMEAD
PERRYDALE
DALLAS
BLACK ROCK
MONMOUTH
YAQUINA
DAWSON
BAILEY JCT
GLENBROOK
ALPINE JCT
TRANSPER
DRAIN
MYRTLE POINT
POWERS
RIDDLE
MYRTLE CREEK
CANYONVILLE
GLIDE
DANEBRIDGE
CASCADE SUMMIT
CRESCENT LAKE
CHILOQUIN
KIRK
DORRIS
HORNBROOK
THRALL
SISKIYOU
ASHLAND
MT HEBRON
BRAY
UPTON
AZALEA
SANGER
ALTON
PITT
GERBER
TEHAMA
WYO
HAMILTON
ORLAND
WILLOWS
CORTENA
STERLING CITY
OROVILLE
BLUE CANYON
MARYSVILLE
YUBA CITY
MARYSVILLE
SUTTER
COLUSA
KNIGHTS LANDING
WOODLAND
DUNNIGAN
ESPARTO
CACHE CREEK
CAPAY
BRENTWOOD
ANTIOCH
PITTSBURG
CROCKETT
VALLEJO
NAPA
CALISTOGA
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REDWOOD JCT
SANTA CLARA
SAN JOSE
GILROY
HOLLISTER
SAN JUAN
SALINAS
MONTEREY
SEASIDE
WATSONVILLE
CAPITOLA
SANTA CRUZ
FELTON
BOULDER CREEK
BEN LOMOND
GLENWOOD
SAN LORENZO
NEWARK
CENTERVILLE
FREMONT
MILPITAS
ALVISO
SUNNYVALE
MAYFIELD
PALO ALTO
MENLO PARK
REDWOOD CITY
SAN MATEO
BURLINGAME
SAN BRUNO
MILLBRAE
SAN FRANCISCO
IGNACIO
NOVATO
SAN ANSELMO
SAN RAFAEL
POINT REYES
PETALUMA
SANTA ROSA
HEALDSBURG
CLOVERDALE
WILLITS
UKIAH
CALPELLA
HOPLAND
CLEAR LAKE
LAKEPORT
CALISTOGA
NAPA
VALLEJO
CROCKETT
PITTSBURG
ANTIOCH
BRENTWOOD
CAPAY
CACHE CREEK
ESPARTO
DUNNIGAN
WOODLAND
KNIGHTS LANDING
COLUSA
SUTTER
MARYSVILLE
YUBA CITY
MARYSVILLE
CORTENA
WILLOWS
ORLAND
WYO
TEHAMA
GERBER
RED BLUFF
WESTWOOD
WESTWOOD JCT
QUINCY
DAIRY
GREENLEY
ALTURAS
LAKEVIEW
KLAMATH FALLS
MEDFORD
GRANTS PASS
ROSEBURG
EUGENE
SALEM
ALBANY
CORVALLIS
TILLAMOOK
HILLSBORO
MARSHFIELD
COOS BAY
REDDING
ANDERSON
WILLOWS
WILLIAMS
CLEARBROOK
CHRISTINE
HARRINGTON
WOODLAND
DAVISVILLE
DAVIS
WINTERS
ROCKLIN
LINCOLN
PLACERVILLE
COLFAX
DANVILLE
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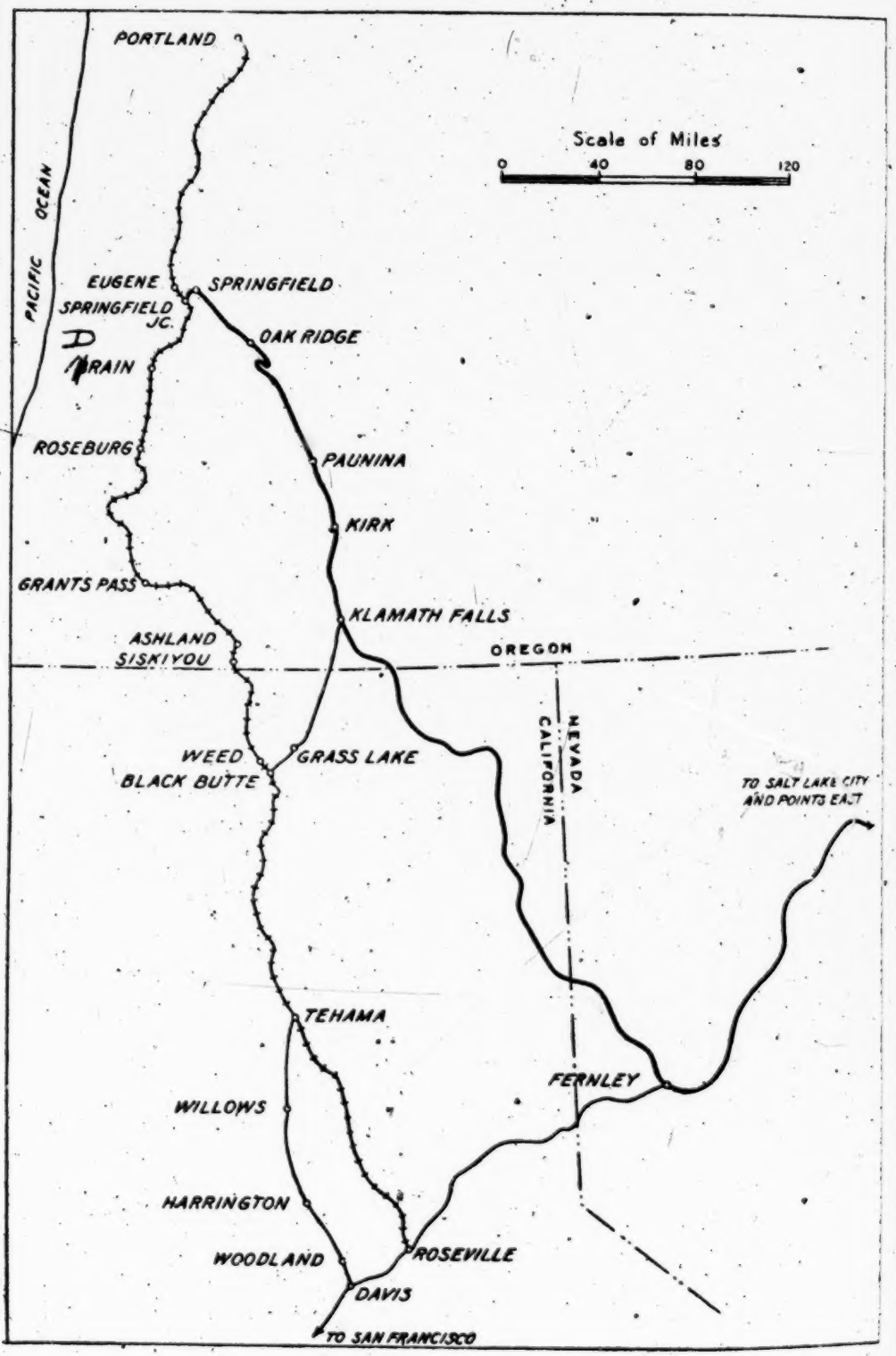
MILTON
PETERS
SANTA CLARA
SAN JOSE
REDWOOD JCT
NILES
HAYWARD
SAN LEANDRO
ALAMEDA
SAN MATE

The Cascade stretch was not completed until 1926 and, as shown by the findings, it is made up of branches extended during a number of years prior to 1912 little by little from Black Butte to Kirk to reach productive forest and agricultural areas. See Diagram 1, following page. At its northerly end a short piece from Springfield Junction to Natron was completed in 1891; in 1912 that branch was built to Oakridge to serve timber areas on both sides of the Cascades and ultimately to be a part of a line connecting with the Central Pacific in Nevada or with the Union Pacific in eastern Oregon. These systems were then under one control. About the same time—1911-1914—plaintiff built from Fernley, Nevada, a point on the Central Pacific, northwesterly to Westwood, California to serve industries there. Consummation of the project to complete the line between Fernley and Springfield Junction via Natron, Oakridge, Kirk, and Klamath Falls was delayed because of the suit brought in 1908 under the Sherman Anti-Trust Act by the United States in the circuit court for the district of Utah (see 188 F. 102), which resulted in decree dissolving control by the Union Pacific of the Southern Pacific. *United States* v. *Union Pacific R. R. Co.*, 226 U. S. 61. In 1929, with the approval of the Interstate Commerce Commission, plaintiff completed the connection between Springfield Junction and Fernley to form a part of the through route between Portland, Salt Lake City, and points east.

The court of claims found that since the completion of the Cascade stretch "plaintiff has had and now has two complete lines of railroad or routes in Oregon and northern California, one the Siskiyou route . . . . serving the valleys and areas described . . . producing much tonnage of timber, agricultural products, livestock, etc., and the other the Cascade route . . . also serving large timber areas and agricultural and livestock producing areas, each of these lines of railroad serving producing areas quite generally at all points. Plaintiff has maintained the Siskiyou route, transporting a substantial and varied traffic and serving a large and important area. The Siskiyou route and the Cascade route are two separate and distinct routes or lines of railroad, necessary for adequate transportation service to the interested areas or territories traversed by such lines."

The stretch of railroad between Springfield Junction and Black Butte via Siskiyou, all land-aided, is 300.42 miles long; it is used for through transportation and also serves locally in the Willamette,

DIAGRAM 1.
Hatched Lines Show Land-aided Mileage.



Umqua, and Rogue River Valleys. All land-aided mileage in that route continuously has been operated and maintained for the service of the public, including transportation of property and troops of the United States. The stretch between the same points via Cascade, none of it land-aided, is 275.6 miles long, most of which is east of the Cascade Mountains. It also carries through and local traffic. To illustrate how unreasonable and arbitrary it is to attribute that mileage to the aided railroad built, as required by the Act of 1866, to open and develop the great valleys west of the mountains, let it be noted that except at and near the connecting points, Springfield Junction and Black Butte, these stretches serve widely separated territories of vast extent; the area between them is greater than that of the State of Massachusetts. The mileage of the Cascade stretch is greater than the distance between Washington and West Point via New York City. The mileage of the Siskiyou stretch is substantially the same as the distance between Washington and Pittsburg.

Upon completion of the Siskiyou Route, plaintiff established through rates between Oregon and California points; in order to meet competition of water carriers, it was compelled to make rates between Portland and San Francisco lower than rates between intermediate points. In 1912, after enactment of the long and short haul clause of § 4, Interstate Commerce Act, the Commission permitted the maintenance of lower through rates; it found they were forced by water competition and were lower than normal, fair and reasonable rates. In 1920, § 4 was again amended to require the Commission to find that the lower through rates permitted by it were reasonably compensatory. In 1927, the Commission, upon plaintiff's showing of operating costs on the Siskiyou Route, found that the through rates were less than reasonable and granted authority to establish rates between the terminals lower than intermediate rates but so much higher than the competing water rates that plaintiff could not share in the business. The Commission thereafter reopened the case. In order to show the reasonably compensatory nature of the lower through rates, plaintiff based its showing on the more favorable transportation conditions and substantially lower operating costs on the Cascade Route. Pursuant to the Commission's report and order of July, 1930, the plaintiff revised its tariffs effective November 11, 1931. The low through rates on the Siskiyou Route were discontinued and higher rates in accord with § 4 were substituted. Much lower rates, to meet water competition, were established via the Cascade Route as to transportation

of about 25 per cent of all articles that move between the cities of Portland and San Francisco. During the period between completion of the Cascade Route and the effective date of the new rates, the through rates were the same via both routes.

The aided mileage in the Siskiyou Route, 663.16 miles, between Portland and San Francisco, is 85.584 per cent of the total. The aided mileage in the Cascade Route is 258.13 miles, or 35.602 per cent of the total. Charges for the shipments in question applicable via the Cascade Route, less 17.801 per cent (one-half of the per cent of land-grant mileage to total) are substantially less than those via Siskiyou, less 42.792 per cent. The government did not expressly direct the shipments in question to be hauled over the Cascade Route but it did in fact choose to have them go that way. It was plaintiff's duty to send them over the route on which the charges would be lower. The government refused to pay more than the lower rates applicable via Cascade minus the land-grant deduction of 42.792 per cent applicable to the higher charges over the Siskiyou Route.

The findings compel the conclusions that the Cascade stretch between Springfield Junction and Black Butte was not built to better alignment or lessen grades of, add trackage to or otherwise improve, the land-aided stretch via Siskiyou between the same points; that it was made up of branches and extensions constructed from time to time to develop productive areas, to serve local needs and, upon completion, to be a separate and distinct railroad between Springfield Junction and Black Butte, a part of which was also to serve as a section of the transcontinental route above referred to. Clearly it is not a part of the railroad aided by the grant of 1866. It was not constructed to aid transportation on, or as a substitute for, any part of the aided railroad. The fact that it is used to haul government shipments like those in question does not suggest any failure of plaintiff fully to perform the land-grant contract to maintain and keep in use the aided railroad between Portland and Roseville. There is nothing in the grant, or in the circumstances under which it was made and complied with, that gives any support to the government's claim that, from the lower charges applicable to shipments by private parties via Cascade, it is entitled to deduct the higher land-grant percentage applicable to transportation via Siskiyou.

II.

The opinion of the court of claims shows its judgment to have been reached on an assumption of fact that is not sustained by the findings or otherwise supported. It says: "'The method of settlement with plaintiff used by the General Accounting Office in this case has been consistently and uniformly followed by the defendant's accounting officers for more than fifty years in cases involving the same or similar questions."

There is no finding to that effect, but to support the statement the opinion continues: "The principle was stated by the Second Comptroller of the Treasury in a decision April 17, 1888, as follows: 'If a railroad have a line between two points, aided in whole or in part, and subsequently acquire a new line or lines nonaided between those same points, the accounts for Government transportation, when performed over the new line or lines, shall be stated in the same proportion of aided to nonaided miles as though the transportation were over the original line.'"

The decision referred to has not been reported or anywhere published. It may be found on file in the General Accounting Office, Miscellaneous Claims Division, Vol. 55, p. 422. The passage above-quoted is one of two sentences excerpted from different parts of the document and together published, without more, as paragraph 1160, Vol. 3, p. 299 of Kern's 1893 Digest of Decisions of the Second Comptroller of the Treasury.[4] As counsel failed to make available to us the unreported text of the decision, it is assumed that nothing more than the statement in the Digest was brought to the attention of the lower court.

To give weight to the Second Comptroller's dictum and justify its application to this case, the lower court adds: "'This rule as stated has been uniformly observed in the settlement of accounts for government transportation of property and troops of the United States, and has been applied in settlement of accounts for transportation rendered by a shorter line substituted in whole or in part for the longer aided and original line. (See stipulations of the parties in *United States* v. *Northern Pacific Ry. Co.*, 30 F. 2d 655.) This long established rule has been acquiesced in by land-

[4] The first sentence reads: "The Central Pacific Railroad Company should recognize the Government's demand that its security for repayment of money advanced in aid of the construction of the original line be not impaired or whittled away by a duplicating of the line."

grant railroads generally and was acquieseed in by this plaintiff during the period between the completion of its Cascade line in 1926 to 1931 when its accounts against the Government for the transportation of Government property were settled in this manner. It was not until the shipments involved in this suit were moved that plaintiff made protest against the position of the Government. We do not regard the fact the rates between San Francisco and Portland were the same over both routes between 1926 and 1931 as material or altering in any way the principle involved."

As to that passage, it is to be observed:

The opinion states that the rule, said to have been established by administrative practice, has been applied to transportation rendered by a "shorter line substituted in whole or in part for the longer aided and original line." The court definitely found that the Cascade stretch is a line separate and distinct from the aided railroad. It was not substituted for or used in lieu of the Siskiyou Route. It was chosen by or for the government because applicable charges, whatever the basis of calculation of land grant deductions, were less than those for like transportation via the other stretch.

The cited stipulation between the Northern Pacific Railway and the United States cannot here be made to serve in lieu of special findings of fact.[5] Moreover, as will be shown, the circuit court of appeals in that case held against the carrier on the ground that new unaided mileage had been substituted for aided mileage in the original route. That case makes strongly in favor of plaintiff here, for the findings of the court of claims show that no part of the original aided railroad had been abandoned as to the traffic in question or otherwise.

The lower court's statement that, from the completion of the Cascade stretch in 1926, until the shipments here involved, plaintiff acquiesced in the rule adopted by the court is not supported by the findings. But, even if warranted, it is without significance for the question presented in this case did not and could not arise while the rates applicable between Portland and San Francisco were the same.

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[5] See M. E. Blatt Co. *v.* United States, 305 U. S. 267, 277. Stone *v.* United States, 164 U. S. 380, 383. Crocker *v.* United States, 240 U. S. 74, 78. Brothers *v.* United States, 250 U. S. 88, 93. United States *v.* Wells, 283 U. S. 102, 120. United States *v.* Esnault-Pelterie, 299 U. S. 201, 206. And see American Propeller Co. *v.* United States, 300 U. S. 475, 479-480.

III.

The court of claims failed to find as fact that the government followed, or the carriers accepted as sound, the dictum excerpted by Kern from the decision of the Second Comptroller of April 17, 1888. To supply the omission, the government cites in its brief, without adequate statement of the facts or explanation, all administrative rulings and judicial decisions it deems to have any bearing on the question now before us. The former are referred to in footnote 10 of this Court's opinion.[6] Here the material substance of each will be indicated.

1. Ruling of April 17, 1888, by Second Comptroller of the Treasury, Butler. At that time, the Central Pacific had three lines between Sacramento and San Francisco. They are indicated on Diagram 2, following page. Route 1, via Brighton, Tracy and Niles was the original railroad, 140 miles, of which 103 were bond-aided. Route 2 via Davis and Port Costa, 90 miles, had no aided mileage. Route 3 via Brighton, Tracy, and Port Costa was 151 miles, of which 63 belonged to the bond-aided stretch in Route 1. The bonds in aid were given under the Act of July 1, 1862, 12 Stat. 489, 494. See also amendatory Acts of July 2, 1864, 13 Stat. 356, and May 7, 1878, 20 Stat. 56. Section 6 declares that the aid grants are made on condition that the company shall keep the railroad in repair and use, transport troops and property of the government "at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service," and that all compensation for that transportation shall be applied to the payment of the bonds. For a time immediately preceding the Second Comptroller's decision, the government stated the accounts of the company as though all shipments had been hauled over Route 1. The railroad maintained that payment should be made in accordance with the bond-aided mileage in the route used. Thus arose the issue decided.

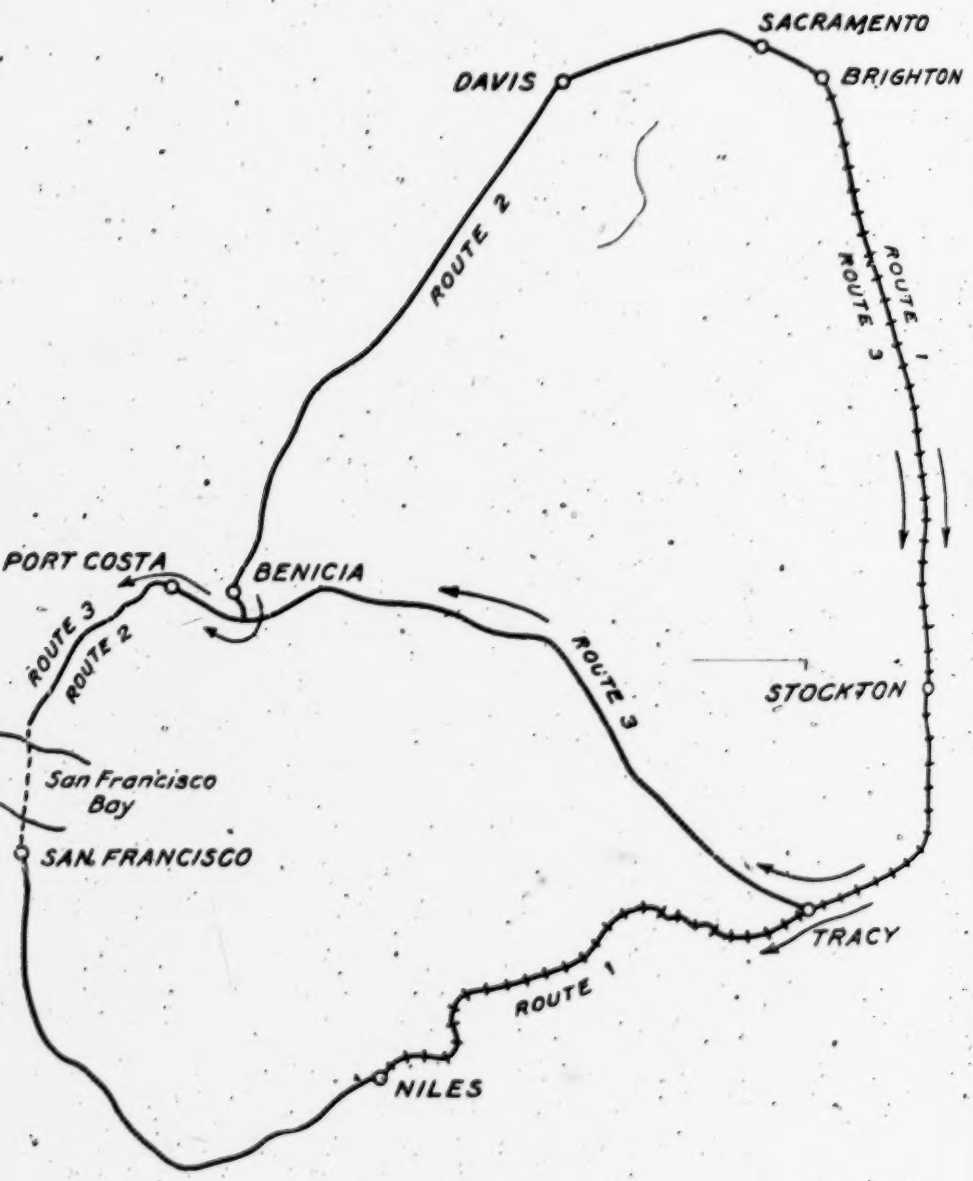
The bond-aid contract had been construed to require the Treasury to retain the compensation for government transportation over

[6] The footnote reads: "(1888) 3 Dig. Dec. 2d Comp. 299. Followed in (1899) V Dec. of Comp. of Treas. 364; followed, (1911) XVII Dec. of Comp. of Treas. 632; (1914) XXI Dec. of Comp. of Treas. 238; (1917) XXIV Dec. of Comp. of Treas. 193; (1923) 3 Dec. of Comp. Gen. 267; (1931) 10 Dec. of Comp. Gen. 552; (1936) 15 Dec. of Comp. Gen. 614. But see (1900) VII Dec. of Comp. of Treas. 224; (1902) VIII Dec. of Comp. of Treas. 474."

DIAGRAM 2.

Scale: Appx. 1 inch = 12 miles.

Hatched Lines Show Bond-aided Mileage.



bond-aided mileage and to apply it in payment of the bonds. *United States* v. *Kansas Pac. Railway Co.*, 99 U. S. 455. *United States* v. *Central Pacific R. R. Co.*, 118 U. S. 235. These cases definitely established that compensation for government transportation over nonaided extensions of the aided railroads should not be withheld or applied to pay the bond debt. But the Second Comptroller held that rule not applicable. He found that accounting officers were required by the Act to determine whether the rates are "fair and reasonable", and stated the problem thus: "Given a certain state of facts, what is the service rendered by the railroad, and what is a fair and reasonable compensation therefor?"

More specifically to disclose the point, the Second Comptroller referred to the contractual relations between the government and the carriers, and asked himself: "Are those relations impaired by the railroad, if it pursues the course which in the present case it contends to be right?" He answered affirmatively and to sustain that view reasoned as follows: To reimburse itself the government may withhold compensation for "carriage over an aided line." The security is impaired if the railroad "parallels or duplicates an aided line between two points and diverts the government business to that line without in some way recognizing its indebtedness to the government."[7]

Then, granting that on strictest legal construction of the statutes and of the decisions of this Court there was nothing to preclude such a course by the railroad, the Second Comptroller went on to say: "But the principles of equity and ethics forbid the application of such a construction." Invoking the maxim "He that seeks equity must do equity" as being "most forcibly pertinent," he declared that so long as the railroad is indebted to the government on account of the bond-aided line, it must not imperil the government's opportunity to recoup, and concluded that all accounts, without regard to the route used, should be stated upon the basis of bond-aided mileage.

The company claimed that acquisition of Route 2 was necessary because it threatened the existence of the Central Pacific and that Route 3 was acquired for convenience because it had better grades

[7] And then, the decision quotes a passage from a message of President Cleveland, then very recently sent to Congress with the report of three commissioners appointed to investigate the affairs of railroad companies that had received government aid, declaring that the acts were passed upon the theory that the roads should be constructed "according to the common rules of business, fairness, and duty, and that their ability to pay their debts should not be impaired by unfair manipulations."

than the original line. It argued that the Government had an interest in the new lines and should be willing to pay entire compensation for carriage over them. Against that contention the Second Comptroller said: "But the acquiring or building by a railroad of new lines connecting two points already connected by the road of the company is one of the ordinary elements of modern railroading, intended to enhance the usefulness of the original line, in the same way as does the *replacing of iron by steel rails,* or *wooden by stone buildings,* of *hand-brakes by automatic appliances.*[8] Is the Government to lose its right of withholding compensation for *carriage over a trestle,* the construction of which *in wood* it aided, simply because the railroad has seen fit *to replace the wooden structure by one of iron?*"

He denounced as untenable both the position of the government and that of the company, and declared "that a medium course is not only practicable and equitable, but is justified under the Acts . . . by the changed and apparently unanticipated condition of affairs since the construction of the railroad was contemplated." He suggested that the company should recognize that the government's security should not be impaired by a duplicating line, and that the government should recognize such an improvement of route as materially lessens distance or difficulties of transportation between two points. Then reasoning in more definite terms, he said:

"If the original line . . . , 140 miles in length, were entirely aided, and the Government's supplies were taken over the new and unaided line, 90 miles in length, it would not be right on the one hand for the railroad to demand actual compensation for the 90 miles, or, on the other hand, for the Government to maintain that the account should be adjusted on a basis of 140 miles and that amount passed to the credit of the railroad on the Government's books. *The non-aided line was used to replace the aided line,* and credit for the 90 miles only should be given the railroad on the Government's books. The same reasoning applies when the original line was aided in part.

"If of the original 140 miles . . . 103 were aided, and the accounts were so stated as to pay the railroad for 37 miles and carry 103 miles to the railroad's credit, the same ratio should be applied when transportation is over a new line between those points, and 103/140 of the total distance traversed should be con-

[8] Italics in quotations are added.

sidered as aided and should be carried to the railroad's credit on the Government's books, compensation for the balance of 37/140 being paid direct to the railroad."

Following these passages the Second Comptroller said: "If a railroad have a line between two points, aided in whole or in part, and subsequently acquire a new line or lines nonaided between those same points, the accounts for Government transportation, when performed over the new line or lines, shall be stated in the same proportion of aided to nonaided miles, as though the transportation were over the original line." This is the statement found in par. 1160, 3 Dig. 2d Comp. 299, on which the court of claims grounded its judgment.

Applying the generalization so attempted he ruled: "On this basis the accounts of the railroad coming to this bureau will be finally settled: I am of the opinion that substantial justice would thus be done—the railroad would not impair the security of the Government, and the Government would recognize the right of the railroad to make *improvements.*"

The crucial phrase of the generalization, "a new line or lines nonaided", would include mileage that is separate and distinct from an aided railroad maintained and kept in use between the same points. But the Second Comptroller, on the grounds that acquisition of new lines was the same as making additions and betterments to the original aided line and that Routes 2 and 3 were used to replace Route 1, treated the lines constituting the three routes as a single railroad bond-aided to the extent of 103 140 of its length.[9] It thus appears that the broad generalization does not express the principle of the decision or fit the situation described by it as mere betterment of the line built pursuant to the bond-aid contract.

The decision does not relate to the question in this case. Plaintiff does not contend that, if aided mileage of the Siskiyou stretch not used may be attributed to the Cascade stretch that was used to do the hauling in question, the corresponding percentage, 42.792 per cent, should not be applied. Plaintiff's point is that the find-

[9] Under our decisions, the contract extended only to the aided railroad. United States *v.* Kansas Pac. Railway Co., 99 U. S. 455. United States *v.* Central Pacific R. R. Co., 118 U. S. 235. As Route 2 had no aided mileage and Route 3 only 63 of its 151 miles, the Comptroller erred in treating the lines constituting the three routes as a single railroad.

ings preclude the assignment of any aided mileage to the nonaided Cascade stretch. The text of the Second Comptroller's decision shows that he did not decide or deal with any such issue.

2. Ruling of January 5, 1899 by Acting Comptroller Mitchell in a *Southern Pacific* case, V Dec. of Comp. of Treas. 364. See Diagram 2. A government clerk traveled to Sacramento via Stockton. A part of the route used was bond-aided. He returned via Benicia on the shorter and usually traveled nonaided route. The question was whether payment should be made to the company for transportation over the nonaided route. This decision merely follows the uncalled for and inapplicable generalization attempted by Second Comptroller Butler in the *Central Pacific* case.

3. Ruling of November 19, 1900 by Assistant Comptroller Mitchell in an *Illinois Central* case, VII Dec. of Comp. of Treas. 224. See Diagram 3. The company operated a land-aided railroad between Cairo and Chicago. It had two routes for passenger travel between Cairo and St. Louis: the shorter via Carbondale and Pinckneyville, had some unaided mileage; the longer, via Du Quoin, was aided throughout. The government having failed to designate either route and the shorter being the usually traveled one over which all through trains operated, the company carried the government passenger that way. The question was whether the land-grant deduction should be calculated on the percentage of land-aided mileage in the route used or on the greater percentage in the other route. Assistant Comptroller Mitchell did not follow the general statement of Second Comptroller Butler in the *Central Pacific* case but held that, as the government did not choose between the routes, the deduction should be calculated on the mileage used.

In the list of administrative rulings, cited by the government, this is the first one that involves construction of a land-grant Act. Land-aid differs essentially from bond-aid. Contracts in respect of the latter require government transportation over aided mileage at "fair and reasonable rates" and that the compensation earned be applied on the bond debt. No diminution of charges for government transportation is exacted. The railroad receives credit instead of cash for the charges calculated at full rates. But the land-grant Acts require service either free or at half rates forever. Questions as to compensation under them concern not merely form of payment

DIAGRAM 3.

Scale: Appx. 1 inch = 26 miles.

Hatched Lines Show Land-aided Mileage.

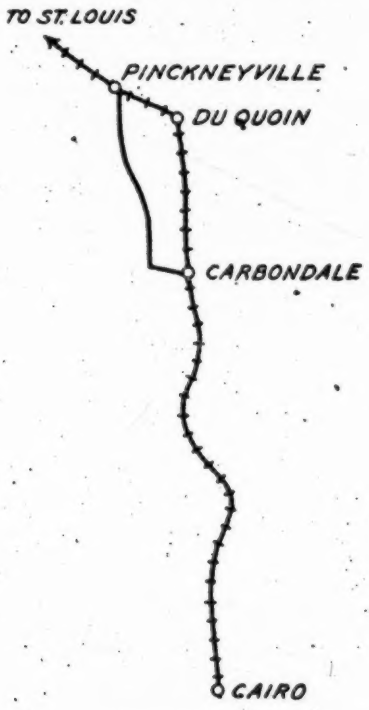
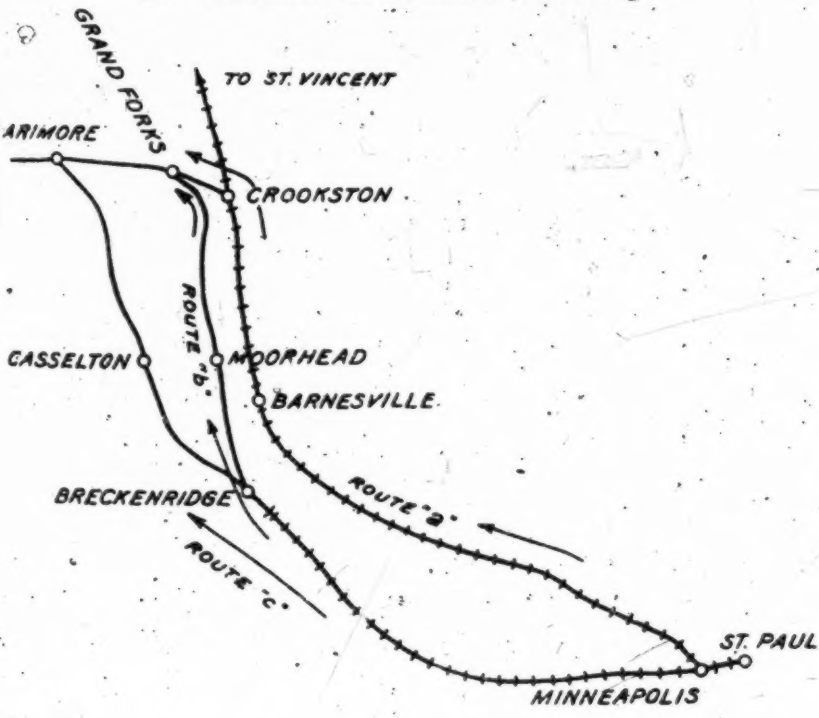


DIAGRAM 4.

Scale: Appx. 1 inch = 74 miles.

Hatched Lines Show Land-aided Mileage.



of full charges but the amount of payment. Unreasonable indeed would it be to hold that carriers' acquiescence in government construction of bond-aid Acts is binding or entitled to weight in cases involving construction of the land-grant Acts.

4. Ruling of January 21, 1902 by Comptroller Tracewell in a *Great Northern* case, VIII Dec. of Comp. of Treas. 474. See Diagram 4. The government shipped property from St. Paul, Minnesota, to points west of Larimore, North Dakota. The company had three routes between the points just named. The percentage of aided mileage in the route via Crookston, "a", is larger than that in either route "b" or "c". The government having failed to choose a route, the company hauled by the shortest route, "c"; it was generally used for like service. The question was whether land-grant deduction should be calculated on the percentage of the shorter line actually used or the higher percentage of the longer one not used.

The decision, as well as the quoted generalization, of Second Comptroller Butler are in terms broad enough to cover the question presented but Comptroller Tracewell, refusing to follow either, decided against the government's contention. He said: "Where, with Government aid, two separate and independent lines of railroad have been constructed from a common point to entirely different points, but which subsequently by extension and independent connections are projected through a common point, and all these lines have subsequently passed to the control of a single company, and transportation is furnished between such common points for the Government by the most usually traveled of said routes, deduction for land grant should be made on the basis of such route, in the absence of a contract or a request for transportation by the other route."

If followed, this ruling would require land-grant deduction in the case at bar to be calculated on the land-grant mileage of the Cascade Route used. Compare Diagrams 1 and 4.

5. Ruling of February 28, 1911 by Comptroller Tracewell in a *St. Louis, Iron Mountain & Southern* (*Missouri Pacific*) case. XVII Dec. of Comp. of Treas. 633. See Diagram 5. The company had a land-aided railroad between Birds Point, Missouri (on the west bank of the Mississippi opposite Cairo, Illinois) and Texarkana, Arkansas, via Dexter, Missouri. Government shipments from Cairo to Dexter were generally transported across the river at Birds

DIAGRAM 5.

Scale: Appx. 1 inch = 17 miles.

Hatched Lines Show Land-aided Mileage.

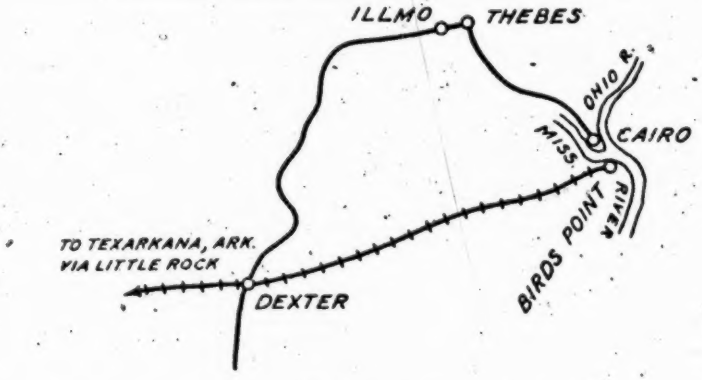
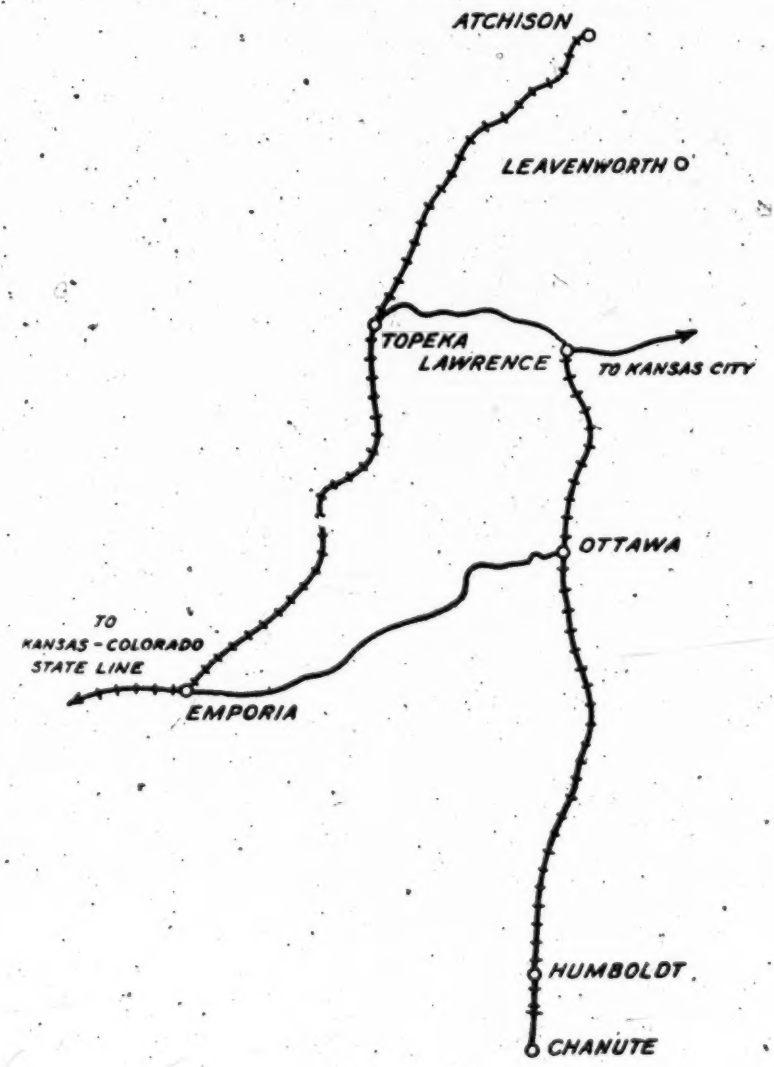


DIAGRAM 6.

Scale: Appx. 1 inch = 58 miles.

Hatched Lines Show Land-aided Mileage.



Poin nd thence by the land-aided line. On government shipments between Cairo and Texarkana by that route, 99.247 per cent was land aided. Because of a change in the bed of the river, it was necessary to haul the shipments in question via Thebes and Illmo. The land-grant deduction applicable to that route was 81.254 per cent. The railroad insisted that, having been forced to give up the old route, it should not be required to make deduction for the non-aided mileage between Cairo and Dexter via Thebes. But the Comptroller refused to accept that contention and ordered settlement on the basis of land-aided mileage in the route via Birds Point.

There is a fundamental difference between that case and the one before us. The carrier had abandoned the land-aided route for hauls between Cairo and Dexter. The Southern Pacific kept the Siskiyou Route in use.

6. Ruling of October 19, 1914 by Comptroller Downey in an *Atchison* case, XXI Dec. of Comp. of Treas. 238. See Diagram 6. The company has a line in Kansas between Lawrence and Chanute, land-aided to the extent of 91.3 miles and unaided as to 3.02 miles, part of the distance between Chanute and Humboldt. It has another line between Atchison and the Colorado boundary via Topeka and Emporia, all of which is land-aided. To connect these two aided lines there was built an unaided branch between Lawrence and Topeka and later another between Ottawa and Emporia. The government shipped cement from Chanute to Holbrook, Arizona. Earlier the shipment would have moved through Humboldt, Ottawa, Lawrence, Topeka, Emporia, and thence to point of destination. But, because of the construction of the branch between Ottawa and Emporia, the shipment in question was hauled over that line. By this route the haul between Chanute and Holbrook was 59.13 miles less than over the other route and aided mileage between those points was less by 91.42 miles. The Comptroller held that the land-grant deduction should be based on the land-aided mileage of the original route. He found that the land-grant Act (12 Stat. 772) required the aided railroads "to be and remain public highways for the use of the government" and that the branch lines made new through routes "to the abandonment, in part, of the aided through route." He said: "It has long been the holding of the accounting officers that the changing of a line of railroad and abandoning of any part of the original aided line does not deprive the Government of its original rights, and settle-

ment for service over the new line is, therefore, required to be made as if the transportation were over the original line. (See 3 Dig. Dec. 2d Comp. 299; V Dec. of Comp. of Treas. 364)".

As the ground on which that ruling rests is abandonment of a part of the aided line, it gives no support to the judgment before us.

7. Ruling of October 1, 1917 by Comptroller Warwick in a *Missouri Pacific* case, XXIV Dec. of Comp. of Treas. 193. The published report does not disclose the physical situation. It is indicated by Diagram 7 prepared on the basis of information found in an unpublished opinion in the same case rendered May 8, 1917. The government shipped stone from Batesville, Arkansas on an unaided line via Kansas City to Leavenworth Penitentiary, Kansas. An older route between the same points was via White River Branch Connection, Cairo Branch Connection, Carondolet Branch Connection, Pacific, and Kansas City. The ratio applicable in computing land-grant deduction for shipments hauled that way is 17.933 per cent. The Warden at Leavenworth paid the company for the service in question over the unaided line, without any land-grant deduction. However, the Comptroller held the carrier subject to the same percentage of deduction as applied to the aided route. On the company's application he granted rehearing, upheld the principle on which he ordered the deduction, and declared it would be applied to future shipments. But, in view of particular facts and equities involved, he concluded that the accounts paid prior to the date of the decision could be allowed without land-grant deduction.

It requires no discussion to show that the direct route used should have been chosen for the transportation in question. The Comptroller cited no land-grant contract to support the rule that he made applicable to future shipments. Nor did he cite Second Comptroller Butler's ruling or any case—and so far as disclosed by diligent research, briefs of counsel and this Court's opinion just announced—there is none that tends to sustain so incongruous an attribution of aided mileage not used to an unaided route used.

8. Ruling of October 27, 1923 by Comptroller McCarl in a *Southern Pacific* case, 3 Comp. Gen. 267. See Diagram 8. This case involved a government shipment from Marshall (Spokane), Washington to Roseburg, Oregon. It was routed over an unaided line of the Oregon-Washington Railroad & Navigation Company subject to an equalization agreement that charges would not exceed the amount payable had the service been by the land-grant line

DIAGRAM 7.

Scale: Appx. 1 inch = 100 miles.

Hatched Lines Show Land-aided Mileage.

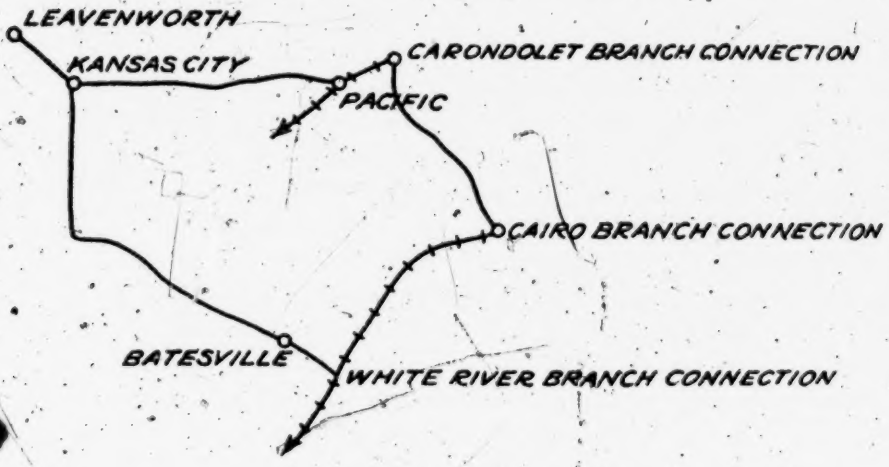
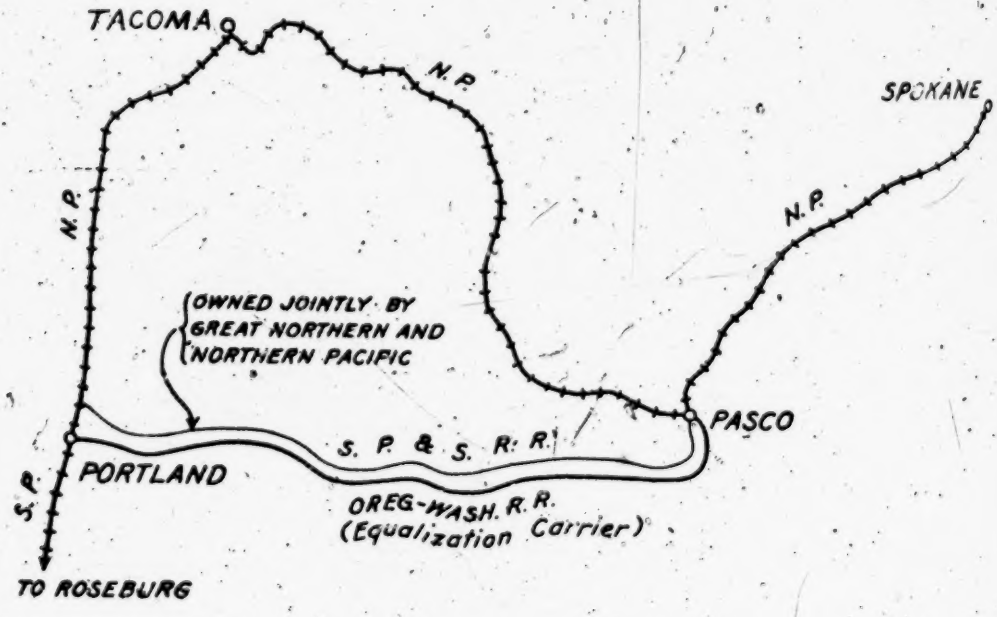


DIAGRAM 8.

Scale: Appx. 1 inch = 64 miles.

Hatched Lines Show Land-aided Mileage.



yielding the lowest net rate. The Northern Pacific line between Marshall and Portland via Pasco and Tacoma was land-aided. Later there was built between Pasco and Portland a line jointly owned by the Northern Pacific and the Great Northern; it is a part of the Spokane, Portland & Seattle Railway. Upon completion of that line, the Northern Pacific canceled its rates applicable between Marshall and Portland by its aided line through Tacoma and announced that the rates in its tariffs would only apply via the new unaided line. The Comptroller held that, as to the government transportation in question, the aided stretch of the Northern Pacific had been abandoned, and that the government was therefore entitled "to the transportation over the substituted line on the same basis as though transportation was furnished over the original land-grant line," and directed that land-grant deduction should be allowed.

That case differs from the one at bar in that the Northern Pacific, having no tariff applicable to the shipment via its aided line, had abandoned that line and for it substituted a new one.

9. The decisions in *Northern Pac. Ry. Co.* v. *United States* are next in chronological order. See Diagram 9, following page. On government request, the company transported two Marines by through passenger train from St. Paul to Seattle. The Northern Pacific land grant aided a route from a point on Lake Superior to one on Puget Sound. Pursuant to the terms of the statute (Act of July 2, 1864, 13 Stat. 365) the aided railroad was built from the terminal established at Ashland in Wisconsin to the one established at Tacoma in Washington. Neither St. Paul nor Seattle is or ever was a terminal on that or any other land-grant line of the Northern Pacific. See *United States* v. *Northern Pacific Ry. Co.*, 177 U. S. 435, 441. St. Paul is more than 100 miles off the aided line; Seattle, more than 50 miles. In the route traveled by the train in question the only aided mileage between St. Paul and the original Northern Pacific land-grant line is a stretch of about 20 miles between Watab and Little Falls, which is a part of the land-aided railroad between Watab and Brainerd constructed by the Western Railroad Company under the Act of March 3, 1857, 11 Stat. 195.[10] There is no aided mileage between Seattle and Palmer Junction, where the original line connects with the route used.

[10] Between Minneapolis and St. Paul the Northern Pacific uses, under an operating contract, 8.23 miles of land-aided road belonging to another company. That stretch was not involved in the litigation.

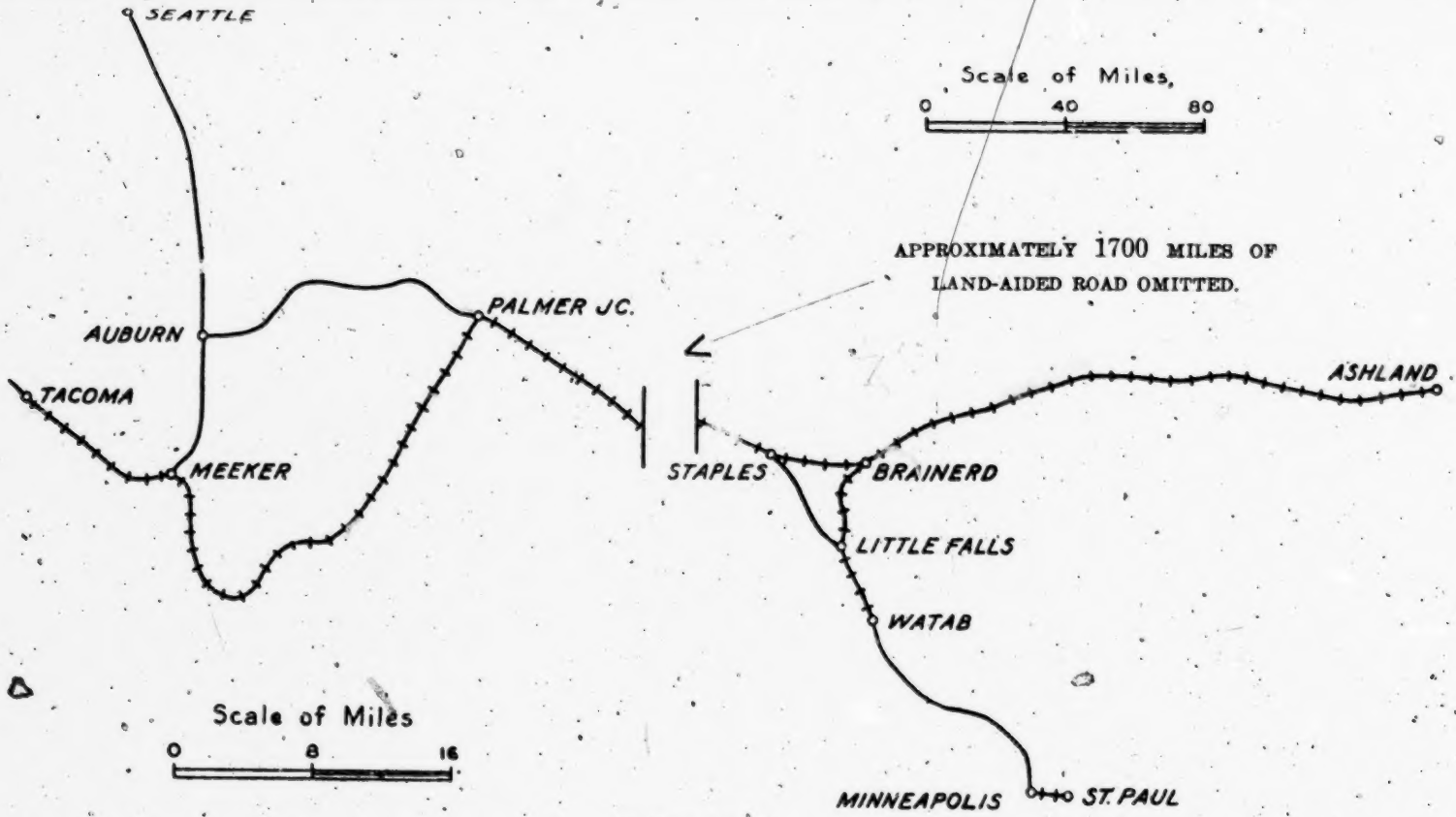


DIAGRAM 9.

Hatched Lines Show Land-aided Mileage

The issue in the case was whether, in addition to an undisputed deduction of 3 per cent, there should be deducted from the full commercial fare, $63.16, a land-grant percentage of 46.001 per cent, as claimed by the company, leaving a balance of $33.09, or 47.285 per cent, as claimed by the government, leaving a balance of $32.29. Thus the amount in issue as to each passenger was 80 cents.

The controversy arose from the fact that the government attributed to the route used the stretches of aided mileage between Little Falls and Staples via Brainerd and between Palmer Junction and Auburn via Meeker, amounting in all to 94.24 miles.

The government's theory was that the new unaided lines were "merely alternate or lieu routes—routes established by the railroad to shorten or straighten its line" and that therefore the calculation of land-grant deduction should take into account aided mileage not used to render the service in question. The district court refused so to interpret the facts and held the deduction should be calculated on mileage actually used. 22 F. 2d 858, 859. But the circuit court of appeals, one judge dissenting, found that the unused aided mileage had been abandoned. 30 F. 2d 655. And upon that interpretation of the stipulated facts, it said (p. 659): "It thus appears that except by this latter route [i.e. via unaided stretches between Little Falls and Staples, and between Palmer Junction and Auburn] through carriage by the Northern Pacific [from St. Paul] to the entire Pacific coast is abandoned." The facts clearly distinguish that case from the one now under consideration. It is here immaterial whether the judgment rests on a correct or erroneous interpretation of the stipulation on which the case was submitted. It is enough to say that the aided stretches were excluded by the company because not used and were included by the government on the ground that having been abandoned, they should be attributed to the route used.

10. Ruling of June 23, 1931 by Comptroller General McCarl in a *Missouri Pacific* case, 10 Comp. Gen. 522. See Diagram 10. The company constructed an unaided cut-off between Jedburg Junction and Eureka Junction, intermediate points on its land-aided line between St. Louis and Pacific. The distance between them via the cut-off is 2.99 miles. Over the old land-aided line via Glencoe, it is 4.93 miles. That track was still in use for some local trains. At another place on its line, within the city of St.

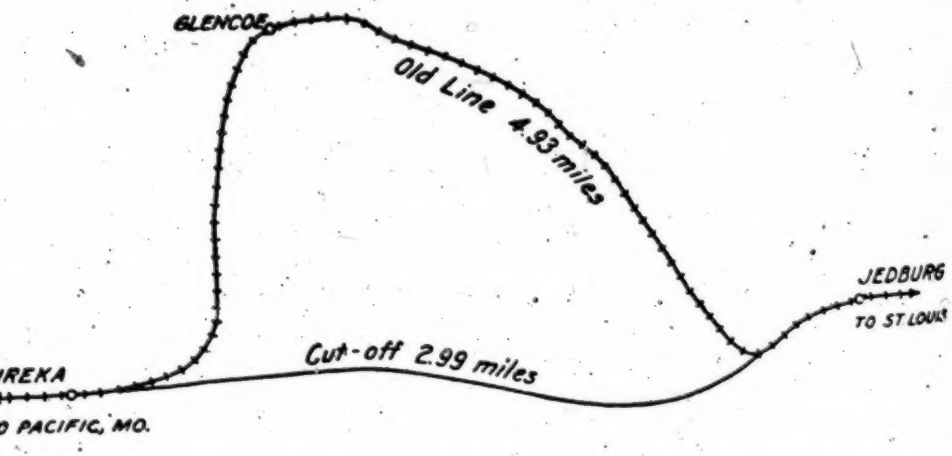
Louis, the company substituted 0.68 of a mile of nonaided line for a longer one which is aided. The Comptroller General held that the aided mileage not used should be attributed to the cut-off mileage used. He said: "It would seem to be too clear for serious argument that of the distances shown after the cut-off . . . between Eureka and Jedburg and the 0.68 miles from union station connection to the union station, or a total of 3.67 miles is not over the land-grant line, but it is equally clear that the new mileage of 3.67 miles was substituted for mileage over the original line for which grants of public lands were made."

It requires imagination to discover in that case anything in principle or in fact that will support the conclusion reached by the court of claims in the case at bar.

11. Ruling of January 16, 1936 by Comptroller General McCarl, 15 Comp. Gen. 614. It has no bearing upon the case at bar. The question was whether, in computing percentage of land grant deduction, the line of the Spokane, Portland & Seattle Railway between Pasco and Portland (see Diagram 8), owned jointly by the Northern Pacific and the Great Northern, is to be regarded as a Northern Pacific line. The Comptroller General answered in the affirmative.

DIAGRAM 10.

Hatched Lines Show Land-aided Mileage.



IV.

There is apparent attempt to draw from the Act of 1928 some support for the construction on which this Court affirms the judgment below. But, so far as concerns the question in this case, that Act does not indicate any congressional interpretation of the land-grant Act of 1866. The sole purpose of that measure was to substitute 50 per cent deduction in place of free transportation; it was passed in order to relieve the Southern Pacific of a burden to which other aided railroads were not subject. When it was enacted, May 23, 1928, only eight of the rulings above referred to had been made; two related to bond-aid contracts and are not in point; two were in favor of the railroads and do not support the judgment in this case. And, as above shown, none gives any support to the expansion of the terms of the contract that is here made. The 1928 Act was passed while the decision of the district court in the *Northern Pacific* case remained unreversed. 22 F. 2d 858 (1927). That case was not decided in the circuit court of appeals until 1929, 30 F. 2d 655. If the Act could be deemed to be a construction of the land-grant—as plainly it may not—it would have to be read as approving the decision of the district court, for that was the only judicial decision in that field.

V.

The land-grant line has been kept in use. The contract is that, where government transportation is wholly over that line, deduction of 50 per cent shall be made and that, where it is partly over that line, there shall be deducted the percentage that aided mileage used is of total haul. But this Court holds that, even if the government elects to have its freight move over a separate and distinct unaided railroad, the plaintiff is bound to apply the percentages applicable to charges for transportation over the aided line. Thus the decision implies a formula or rule to the effect that a land-grant deduction once found applicable to charges for transportation over a route made up of aided and unaided mileage between two points is to be applied to all subsequent government shipments between those points, even if the route actually used includes no aided mileage. There is nothing in this contract or in any of the railroad land-grant Acts, either as written or as hitherto construed, to warrant that construction.

I am of opinion that the judgment should be reversed.

Mr. Justice McReynolds and Mr. Justice Roberts join in this opinion.